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A TREATISE
ON
EQUITY

BY
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PREFACE

The purpose of this treatise is to state the rules and principles of equity as they exist today in the simplest terms and to develop and explain them always in the light of their historical development and the fundamental reasons on which they depend.

Modern equity should be approached from the standpoint of the merger of law and equity under the codes and other statutes which have definitely brought law and equity together in England and most of the states. Even in the non-code states there has been a very considerable merger under independent statutes. There has been and still continues to be altogether too much emphasis by authors and teachers upon the equity of early times and too little upon modern equity which has emerged as a co-ordinated part of the single system of law under which we live. One major purpose of this work is to restate the rules and principles of equity from the point of view of this merger of law and equity.

What was stated by the author in the preface to his work on the law of Property in 1915 with reference to the function of a treatise of this kind might well be repeated. The wilderness of cases under which the legal profession struggles along makes more and more necessary treatises which seek to determine the law as it actually is by analysis based on legal history and fundamental principles. The courts are actually returning more and more to a *stare decisis* of principles which prevailed during the earlier centuries of the law's history, as distinguished from a narrow *stare decisis* based on mere decisions. The author has not hesitated to attempt a solution of the problems treated in this treatise, in an honest effort to produce a work which may be of some aid in performing this function.

A work in one volume cannot cover the entire field of equity. Nevertheless all the subjects usually treated in law school courses

on equity have been treated with considerable thoroughness, with a liberal citation and discussion of representative cases. The subject of Trusts is almost everywhere treated as a separate subject, and is therefore omitted, though the history and nature of trusts are treated with some fullness.

The author is particularly indebted to Professor Cook, whose Cases on Equity have been used by him in his classes since they appeared, the plan of which work has been followed as to arrangement of topics, for the most part, in this treatise. It is his purpose to use this work in connection with Cook's Cases in his classes on Equity. Professor Durfee's Cases on Equity were also of great help in the preparation of this book, as were Professor Chafee's Cases on Equitable Relief Against Torts. It is hardly necessary to state how much we all owe in work of this kind to the cases and other works of Ames and Keener. Professor Williston's outstanding work on Contracts, one of the best illustrations of the modern treatise performing the function described above, has been of invaluable aid in preparing the chapters on Specific Performance and Fraud and Mistake, and is freely cited and discussed in the notes.

The author acknowledges his indebtedness to his former teacher and present chief, Dean Sommer, for his aid in surmounting many an obstacle in the preparation of the book; also the very effective and unselfish aid of Mr. George Foster, Managing Student Editor of the New York University Law Quarterly Review, in checking citations and other work.

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September, 1930

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WALSH ON EQUITY

PART I

HISTORY, NATURE AND CHARACTERISTICS OF EQUITY

CHAPTER I

HISTORY OF EQUITY PRIOR TO CHANCERY

§ 1. **Equity Prior to the Thirteenth Century.** Any definition of equity must necessarily be incomplete and therefore misleading, or so general and vague as to be of no real value. The content and nature of equity can be understood only by a study of its historical development and of the principles and practices which it comprehends.[1] We think of equity as that system of remedial law administered by Chancery in England and by courts in the United States which exercised like powers and administered a like system of law. But from the beginning of English law, during the Saxon period down through the early Norman period, equity was administered by the king and witan during the Saxon time, by the king and the great court of the nation which succeeded the witan after the Norman conquest. The king's prerogative included the power to do justice in any case between his subjects brought to his attention by

1 "Equity is that body of rules which is administered only by those courts which are known as Courts of Equity. . . . This you may well say is but a poor thing to call a definition. . . . Still I fear that nothing better than this is possible. The only alternative would be to make a list of the equitable rules and say that equity consists of these rules. . . . Therefore for the mere purpose of understanding the present state of our law some history becomes necessary." Maitland, Equity, 1, 2; Ibid. 13, 14.

petition or otherwise. He was the fountain of all justice, and in him, acting with the advice and consent of his witan, court or council, resided the final power to do what justice and right required.[2]

Ordinary law and justice for the people generally, down to the latter part of the twelfth century, was administered by the courts of the hundred and the shire in the Saxon time, by the courts of the manor and the county during the early Norman period. These courts, made up of a considerable body of men fairly representative of the average of the people, uneducated and entirely lacking in anything like legal knowledge or training in the modern sense, administered an extremely rude kind of law, unwritten, made up of the customs of the people, varying from time to time and in different communities, and handed down from generation to generation by word of mouth.[3] The forms of trial were for the most part appeals to the supernatural. It was an exceedingly crude law which, however, seems to have met the needs of the crude society of the time. Another and superior kind of justice was administered in controversies where the king on his thegns or lords were involved, by the king and witan before the conquest, by the king and his court thereafter. This, however, was a regular system of law administered for the very great, distinct from the king's justice in special cases affording relief not available in the regular courts.[4] Nevertheless this regular administration of law by the *Curia Regis* was royal law, based on the same ultimate and supreme power in the king to do justice as was the special relief in exceptional cases through the king's prerogative of grace, which later came to be called equity.

§ 2. **Equity Administered as Part of the Common Law.** The common law, as distinguished from the customary law of the popular courts described briefly in the preceding section, originated in the establishment by Henry II of a national court ad-

[2] Walsh, Hist. Eng. & Am. L. 69, 70; 1 Poll. & Mait. Hist. Eng. L. 85, 87; Kerly, Hist. of Equity, 13, 14.

[3] Walsh, Hist. &c. §§ 4, 18, 19, 20; Glanvil, lib. XII, cap. 6, and lib. XIV, cap. 8; 1 Poll. & Mait. Hist. &c. 66 *et seq.;* Digby, Hist. L. Real Prop. (5th Ed.), 62–68.

[4] Walsh, Hist. &c. 70; 1 Poll. & Mait. Hist. &c. 85, 87. 1 Holdsworth, Hist. Eng. L. 40.

ministering a law for the entire nation. By means of the assize of novel disseisin, the grand assize, the assize of *mort d'ancestor* and other writs resulting in reasoned verdicts of juries instead of trial by oath helpers and by battle, he secured for this new form of royal justice, control over all cases involving ownership of freehold estates in land, by far the most important part of the of the law of the time.[5] By the process of presentment or indictment through accusing juries he secured for his judges jurisdiction over the more serious crimes.[6] This work required a law court in the modern sense made up of a small number of judges of education and ability skilled in the law which sat regularly term after term, generally at Westminster, often at the Exchequor.[7] The king's law was brought directly to the people by judges in eyre who travelled throughout the country holding sessions of the king's court in the different counties usually in connection with special sessions of the county court in each county, and by other judges acting on special commission to try at first assizes of novel disseisin and other assizes in the locality where the property involved was situated, and therefore called justices of assize, these judges finally acting under general commissions with powers and functions differing little from those of the court at Westminster. Thus at the end of the reign of Henry II we find established a *Curia Regis*, court of the king, which was a true court of law in the modern sense, administering a national law, common to the entire country, and which has largely displaced the customary laws of the different parts of the country, particularly with respect to the law of land and of the more serious crimes. The measure of this accomplishment is found in Glanvil's Treatise, our first real law work, which is the very beginning of the written record of the English common law. The details of this development belong elsewhere.[8] This continued during the thirteenth century, so that by its close we find the common law definitely established as the law of the nation, displacing the customary law and the local courts which were limited to local petty matters or relatively unimportant sur-

5 Walsh, Hist. &c. 81–85; 1 Poll. & Mait. Hist. &c. 125–127; Digby Hist. L. Real Prop. (5th Ed.), 110, 111.

6 Poll. & Mait. *Ibid.* 130, 131; Thayer, Prelim. Treatise on Evidence, 68 *et seq.;* Walsh, *op. cit.* 85.

7 Walsh, *Ibid.* 85, 86.

8 Walsh, *Ibid.* 86–88; 1 Poll. & Mait. *op. cit.* 134–137.

vivals. The law of *Curia Regis* which had been the law of the very great, scarcely touching the mass of the people, had been extended and adapted to the needs of the people so as to become the common law of the nation.

From the standpoint of our study of equity the important fact to appreciate is that this law was the king's law, to be purchased and paid for by the plaintiff seeking a writ from the king's secretary, the Chancellor. It was not to be had for the asking as a natural right. It rested on the power of the king, acting with the advice and consent of his great court, to do justice, that is to say upon his power and authority as the fountain of all justice.[9] In other words it rested on the power of the state. The king, acting with the advice and consent of his general court, was the state in action. The supreme power of the state was in him and his court, principally, almost exclusively at this time, in him. The judges of his law court, the *Curia Regis,* acted with all the power of the state, so far as that power had been delegated to them. In the last years of the twelfth century and during the first half of the thirteenth relief was granted in the freest way in all sorts of cases. The Chancellor was then the king's secretary, and Chancery was the secretariat of the state. Writs, like all other state papers, were prepared there, and the clerks in Chancery issued writs starting the various actions above referred to, and many others which had become a matter of course, whenever a complainant applied for the writ based on facts which brought his case within the limits of the action which the writ initiated. Bracton describes a class of writs, *breve magistralia,* which were very freely issued in the first half of the thirteenth century to meet new cases where justice seemed to require that an action be allowed. Professor Holdsworth says that the use of these writs was "the immediate and effective cause of the rapid development of the law during this period."[10]

[9] Adams, The Origin of English Equity (1916), 16 Col. L. Rev. 87. He said: "In this new legal evolution (of the common law), the following principle is fundamental from the very beginning: The new procedure and the new machinery are the king's private property; they are no part of the public machinery of the state to which any individual may appeal in his personal need as he might to the shire or hundred court." See, also citations in notes 5 to 8, *supra.*

[10] 2 Holdsworth, Hist. Eng. Law, 245.

With so flexible a power to issue writs to meet any situation which seemed to require relief, followed by the granting of the appropriate relief by the king's judges, there must have been little or no occasion to appeal to the king for relief under his prerogative of grace. The king's justice was being dispensed by his judges and without unreasonable restriction. We find, therefore, as we would expect, that many forms of relief, distinctly of an equitable character according to the later classification, were administered by the king's judges as part of the common law in Bracton's time.[11] Thus a use, or *opus*, of land might possibly be enforced at law in the thirteenth century in favor of the beneficiary by a remedy similar to the writ of detinue by which a third person could enforce a bailment made by the bailor with the bailee for the benefit of such third person.[12]

[11] Adams, The Origin of English Equity (1916), 16 Col. L. Rev. 87; Barbour, Some Aspects of Fifteenth Century Chancery (1918), 31 Harv. L. Rev. 834. Prof. Barbour says: "It is now more than thirty years since Justice Holmes in a brilliant and daring essay set on foot an inquiry which has revealed the remote beginnings of English equity. Equity and common law originated in one and the same procedure and existed for a long time, not only side by side, but quite undifferentiated from each other. Their origin is to be found in the system of royal justice which the genius of Henry II converted into the common law. . . . There was no equity as a separate body of law; for the king's justices felt themselves able to dispense such equity as justice required."

[12] 2 Holdsworth, Hist. &c. 245, 246; Holmes, Early English Equity, 1 Law Quarterly Rev. 162, 2 Sel. Essays Anglo-Am. Leg. Hist. 705; Ames, Origin of Uses & Trusts (1907), 21 Harv. L. Rev. 261, 2 Sel. Essays &c. 737 *et seq.* Holdsworth cites Bracton's Note Book, cases 1683, 1851, as tending to show that such a remedy might be had. Ames insists that uses as enforceable rights, as distinguished from mere moral rights in the *cestui*, had no existence until enforced by the Chancellor. He says: "It must have been all the easier for the Chancellor to allow the subpoena against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use of a third person, or to be redelivered to the person from whom he had received the chattels or the money," citing many cases from the Year Books. This indicates that the remedies at common law against trustees to uses were definitely established where personal property was involved, but interposition by the Chancellor became necessary in corresponding uses of real property because the remedy attempted in Bracton's time failed eventually to became established at law.

Many forms of specific relief, as distinguished from damages, could be had in the King's Court at this time. One of the most striking instances was the right of a tenant to enforce specific performance of the landlord's covenant to give the tenant the possession and enjoyment of the leasehold property during the term by suing out a writ of covenant. Professor Holdsworth says that similar relief was given by the writ of *quare ejecit infra terminum.*[13] But the two cases were very different. The tenant could not maintain covenant against anyone but the landlord. He did not recover the land as his property; he recovered it in a personal action of covenant based on the landlord's promise under seal, in specific enforcement of that promise. The writ *quare ejecit* was issued about 1235 to give the tenant an action to recover the land as owner from the landlord's grantee who had ousted the tenant. There was no question of enforcing the covenant, as the defendant had made no covenant. He was simply a wrongdoer who had ousted the owner from the land and under this writ and later under the writ of *ejectio firmae* the tenant's ownership of an estate in the land was definitely established. But prior to these writs he had no estate. He had merely a personal right of covenant enforceable against the landlord, the covenantor, alone, not against any third person who might oust him.[14] Professor Holdsworth gives us several other cases taken from Bracton's Note Book in which specific relief of the same kind was given. Thus a defendant was required to transfer seisin as provided for in a fine by which he had bound himself.[15] Specific fulfillment of the duty of warranty by a donor, of a mesne lord to perform feudal services so that his tenant should not be disturbed by the overlord,[16] of a tenant to repair,[17] are some of the more striking of these cases, in which performance was enforced either by distraint, forfeiture of the land or the taking of security.

We find similar cases of specific relief suppressing the continuance of nuisances.[18] The writ of prohibition was used to pro-

[13] 2 Holdsworth, *op. cit.* 247.

[14] Walsh, Hist. &c. 129–131; 2 Poll. & Mait. Hist. &c. 106–109; Digby, Hist. L. Real Prop. (5th Ed.) 177.

[15] 2 Holdsworth, *op. cit.* 247, citing Bracton's Note Book, case 1579.

[16] *Ibid.* 248, Bracton's Note Book, cases 594, 390.

[17] *Ibid.* case 1165.

[18] 2 Holdsworth, *op. cit.* 248; Bracton's Note Book, cases 1162, 1253.

hibit the commission of waste by tenants for life and for years, including tenants in dower and curtesy and guardians in chivalry.[19] The writ of estrepment was used to prevent waste pending a real action, and after judgment therein, operating very like injunctions *pendente lite* of later times.[20]

Why did not this equity of the King's Court develop so that we might have been spared the spectacle of two competing, and in many important respects, conflicting, systems of law existing in the same state? The answer is found in the hardening of the common law into a rigid system limited narrowly to fixed forms of action, giving relief in the form of damages for wrongs after their commission, to the exclusion of specific relief apart from real actions for the recovery of land.

Specific relief was the rule rather than the exception under the ancient customary law of the shire and manorial courts. The owner recovered his chattel by the appeal of larceny, not its value in damages.[20a] The recovery of unliquidated damages came into the law as an incident of the assize of novel disseisin —the plaintiff recovered not only his land but damages for its unlawful detention. When trespass became a writ of course about 1250 the recovery of unliquidated damages was a well-known practice, and was adopted as the exclusive remedy in trespass actions arising out of the wrongful taking of chattels, which took the place of the appeal of larceny, as well as in actions for trespass to land and to the person.[21] The subsequent development of personal actions was the development of trespass, through actions on the case, and the remedy in all these cases was limited to money damages. The real actions for the recovery of land all involved specific relief, the recovery of the land itself, not damages, but apart from cases of the recovery of land or the enforcement of specific interests in land, specific relief could not be secured under the different

19 *Ibid.* cases 461, 527, 540, and several other cases cited, 2 Holdsworth, *op. cit.* 248, notes 14 to 18. See also Hazeltine, Essays in Legal Hist. (1913) 269–284.

20 Prof. Holdsworth says Bracton's Note Book affords many instances of these writs operating before judgment *pendente lite,* as well as after judgment. 2 *Ibid.* 249, n. 4.

20a Walsh, Hist. &c. § 77, and authorities there cited.

21 Ames, Hist. of Trover, 3 Select Essays &c. 423, *et seq.;* Walsh, Hist. &c. 313–327, as to development of personal actions in tort.

forms of action which took shape during the latter half of the thirteenth century and thereafter.

The hardening process which reduced the common law of the King's Court to restricted forms of action eliminating specific relief, therefore ending the possibility of the development of equity as part of the common law system, resulted primarily from the Provisions of Oxford, 1258, which expressly forbade the Chancellor to frame new writs without the consent of the king and Council.[22] The great freedom which existed prior to this statute in the issuance of new writs, and the consequent flexibility in the law permitting a remedy in any case where justice required it, was extinguished by it. The existing writs which had become *de cursu,* together with such new writs as were made thereafter by direction of the king and his Council or Parliament fixed the limits of the remedies which could be secured at common law.[23] The situation was improved by the famous 24th Chapter of the Statute of Westminster II, which provided that "Whensoever from henceforth it shall fortune in Chancery that in one case a writ is found, and in like case falling under like law is found none, the clerks of the Chancery shall agree in making a writ or shall adjourn the plaintiffs until the next Parliament, and the cases shall be written in which they cannot agree, and be referred until the next Parliament; and, by consent of the men learned in the law a writ shall be made, that it may not happen that the King's Court should fail in ministering justice unto complainants."

Professor Holdsworth makes clear that the decay of equity in the common law courts was a gradual matter, not completed until, after the middle of the fourteenth century, jurisdiction in equity had definitely been taken over by Chancery. The methods of proof and of procedure in Chancery were so much more effective than were the narrowed methods of the law courts to accomplish the results required in equity cases that relief of this kind ceased altogether at law, and could be had only in Chancery.[24] He refers to cases in the reign of Edward I, and as late as 1313, 1314, in which relief of an equitable nature

22 Kerly, Hist of Equity, 9.

23 Kerly, *Ibid.* 9, 10.

24 2 Holdsworth, Hist. &c. 334–347; 1 *Ibid.* 448. 449.

was given by common law courts.[25] The Bills in Eyre, discovered by Mr. Bolland, show a remarkable survival of equity at common law, administered by the justices in eyre from about 1274 to 1331, possibly somewhat later. These were very similar to bills in equity, viz., petitions to king and Council referred to the Chancellor as hereafter described, or petitions to the Chancellor direct. They probably originated in instructions by the king to the Commissioners who held the inquest of 1274 to hear *querelae,* and the practice of hearing *querelae* by bill was established through similar instructions given to the judges in eyre in 1278 and thereafter.[26] Relief was given without a writ. The bill was generally in simple form, without formality, and free from the technical rules which applied to writs. In some cases the judges corrected defects in them by examining the complainant and thus getting at the real matter complained of. The remedy sought was sometimes specific relief, sometimes damages. As to the matters complained of Mr. Bolland says: "We see that no misfeasance or non-feasance was too slight or too grave to be the subject of complaint by a bill in eyre. The recovery of debts, large and small, and the enforcement of contracts were sought for by them. Damages were claimed by them for detinue, breach of contract, trespass, negligence . . . conspiracy to deceive the court and pervert the course of justice, and for almost every other tortious act or omission by which a man might be endamaged."[27] No doubt they were introduced to fill a gap left by the elimination of the appeals of the customary law before trespass had developed sufficiently to take their place, but under them justice was administered in many cases where no relief otherwise could be had, mostly

[25] 2 Holdsworth 335, 336, citing, among other cases, Y. B. 30, 31, Edw. I (R. S.) 324, writ of prohibition made to act as an injunction to stay the cutting of timber; Y. B. 30, 31, Edw. I, (R. S.) 194, Berwick J.: "We command you that under penalty of one hundred pounds you have the infant here before us on such a day"; Y. B. 2, 3, Edw. II (S. S.) XIII, XIV, 58, relief against penalties; Eyre of Kent (S. S.) i91, an order to restore a road; ibid. iii 129, an order to restore a stream "to its proper and ancient channel."

[26] 2 Holdsworth, Hist. &c. 336, 337, citing H. S. Cam, Vinogradoff, 6 Oxford Studies, 133–138.

[27] Select Bills in Eyre (S. S.), xl. See *Ibid.* XIX, XX, XXII, XXV, XXXIV, and other references, 2 Holdsworth, *op. cit.* pp. 337, 338; notes.

in favor of poor complainants, and much of it of a distinctly equitable character. But the disappearance of justices in eyre and the establishment of justices of the peace to administer local criminal law around the middle of the fourteenth century ended bills in eyre. Chancery as a court of equity was taking form at about this time, administering in a direct way the prerogative of grace belonging to the king, with an infinitely superior machinery with which to get at the truth and to give specific relief, and the last survivals of the equity administered by the king's judges of the thirteenth century disappeared.[28]

It has sometimes been said that if the common law judges had taken advantage of the power given them by the statute of Westminster II there would have been no need or occasion for the development of equity in the Chancellor's court.[29] But the reasons why this had become impossible without further action of king and Council are apparent. By the middle of the fourteenth century the granting of specific relief by way of specific performance, or by way of preventing nuisances or other wrongs, had been definitely lost through the triumph of the principle of damages as the basis of relief at law. We shall see, in considering the development of equity in the fifteenth century, that in many different respects the law as it developed failed to give adequate relief, and equity was called on to fill these gaps. In none of these cases could relief be given under the statute of Westminster II in accordance with the forms of relief and of procedure which the common law had developed.[30] It is another and entirely different question

[28] 2 Holdsworth, *op. cit.* 345, 347. 1 *Ibid.* 448, 449. There can be no doubt, as Prof. Holdsworth states, that bills in equity had their origin in bills or petitions to king and Council, not to bills in eyre. The procedure under bills in eyre was, after the bill was received and the proceeding started, in accordance with the common law, in no way according with procedure in Chancery as it later developed.

[29] See 3 Bl. Com. 51; Austin, Jurisp. 635.

[30] 2 Poll. & Mait. Hist. &c. 523, 595; Huston, Enforcement of Equity. Decrees, 72, 73. See Kerly, Hist. of Equity, 11, 12; Ames, Lect. Legal Hist., 443, 444, stating in reference to Blackstone's observation: "Such an opinion betrays a singular failure to appreciate the fundamental difference between law and Equity, namely, that the law acts *in rem* while Equity acts *in personam.*" This distinction between law and Equity is discussed hereafter, §§ 9, 10, 11.

why the king and Council referred to the Chancellor petitions for relief where for any reason the common law failed, instead of referring them to the judges with power to act as the Chancellor acted, avoiding the development of two conflicting systems of law. This latter question will be considered further in the section following.

CHAPTER II

HISTORY OF EQUITY IN THE CHANCELLOR'S COURT

§ 3. Origin of the Chancellor's Jurisdiction in Equity. The limiting of the common law to a rigid system of formal actions, and the development of damages as the one remedy in personal actions, together with the growth of narrow, technical rules of pleading, procedure and proof, left a great many situations in which no relief was to be had at all or where the relief available was clearly inadequate. It was natural that petitions to the king or the Council should be made for relief in these cases. The king's prerogative to do justice in all cases where the usual means of redress failed was again called upon for relief. While the common law was administered by the king's judges as the king's law, giving remedies in all cases where justice demanded them, there could be no distinction between law and equity based upon this prerogative of the king. The common law included all.[1] But when the common law had completed the process of supplanting the ancient customary law, and had in turn become the regular system of remedial justice, but with gaps and defects where no sufficient remedies were provided, the ancient power of the king as the fountain of all justice was again brought into use.[2] This royal

[1] See preceding section, notes 9 and 11.

[2] "So long as the Common Law remained a flexible system, its field undefined, its power of inclusion unlimited, its organs undifferentiated, there was no reason for distinguishing between it and Equity, and all that was later done by Equity could still be done in the field of the Common Law. . . . It is only as the Common Law became a hard and fast system, as men began to ask themselves about boundaries of action and limitations upon the new, that a new field must be found for the action of the royal prerogative in securing general justice not specially provided in the ordinary way, for this duty and this function still remain in the king." Adams, The Origin of English Equity (1916), 16 Col. L. Rev. 87–98.

"The manner in which equity in this sense disappeared from the

prerogative of grace, this power and duty of the king to do justice, was administered through the Council. The great court of the king, succeeding the witan after the Conquest, constituting with the king the governing body of the nation, had developed into and was known as the Parliament in the first half of the fourteenth century.[3] The Council was the "core and essence" of Parliament. It was made up of the great executive officers of state, the judges of the King's Court, including its two divisions, King's Bench and Common Pleas and justices in eyre, and an indefinite number of the great men of the kingdom, bishops, barons, earls and others whom the king selected to act as his advisers from day to day in the affairs of state. The Council sat continuously for the transaction of business, while Parliament met four times a year only, when specially summoned. The king and Council was the government in action from day to day between sessions of Parliament. It was, in the main, an executive body, but with many judicial powers and duties because of its close connection with the king.[4] The closest relation existed between the Council and the King's Bench, *coram rege*. When the king called the officers of state and his other advisers of the Council to attend a session of the Court it became the Council. Like the old King's Court

common law is become common knowledge. The jealousy of Parliament, which may be but the reflection of the attitude of the community at large, the realization that the power to make new writs is the power to make new law, forced the writs into a closed cycle, and put an end to the free development of the common law. Without doubt the judges, who seem to become more conservative as ecclesiastics sit more rarely on the bench, furthered this restrictive movement. At all events the law became so fixed and inflexible, its practitioners were so absorbed in nice questions of form and pleading, that there was no longer room for equity. This has become the situation early in the fourteenth century; as a result a new field for the royal prerogative is found and equity is administered in the council from which in the next century the Court of Chancery breaks off." Barbour, Some Aspects of Fifteenth Century Chancery (1918), 31 Harv. L. Rev. 834–859. See also Kerly's Hist. Eq., 13, 14; 5 Holdsworth, Hist. &c. 215, 1 *Ibid.* 399; Spence, Hist. of Chancery, 2 Sel. Essays, 225; Walsh, Hist. &c. § 51.

[3] 1 Holdsworth, Hist. &c. 477; Spence, Hist. of Chancery, 2 Sel. Essays, 226.

[4] 1 Holdsworth, *loc. cit.* 478; Kerly, Hist. Eq., 16, 17; Spence, Hist. of Chancery, 2 Sel. Essays, 226, 227.

of the twelfth century the Council tried important cases involving the king or between great men, or involving the special prerogative power in the king to give relief where relief could not be had through the regular courts.[5] It received petitions of all sorts in great numbers. Most of these it disposed of by referring them to the appropriate agency for relief, some to the law courts, some to the Chancellor, some to Parliament, and some to the king, so that final action might be taken.[6]

The Chancellor was the chief law member of the Council. As Secretary of State and Prime Minister to the king he was the most powerful and important executive officer of state, next to the king. Though the issuances of writs had become a ministerial matter as the result of the limitations upon new writs in the latter half of the thirteenth century as explained in the preceding section, yet his power and responsibility as chief law officer of the Council in determining when a new writ should issue must have been very great. These facts, and the further fact that the Chancellor in the period we are discussing was usually a great ecclesiastic, versed in ecclesiastical and moral law, made it very natural that petitions to the Council, or to the king, or to both, should be referred to him as a committee of the Council to hear and determine and to do justice as reason and conscience might dictate.[7] By the early years of the fourteenth century Chancery had become a court of common law jurisdiction to try and dispose of several different kinds of cases according to common law principles and pro-

5 "They were brought before the council because it was now the body in immediate contact with the king—the body through which he carried on the work of government." 1 Holdsworth, *op. cit.* 478.

6 Hale, Jurisdiction of the House of Lords, 25. See Ordinance Governing the Council, in 13 Richard II, Proceedings of Privy Council, 1, 18, providing that the Council shall meet at 8 or 9 o'clock A. M., at the latest, and shall take the king's business first; that it shall send matters touching the common law to the judges, matters touching the office of the Chancellor into Chancery, and those touching the office of the treasurer into the Exchequor; that all matters which cannot be disposed of without the special grace of the king shall be sent to him to hear his advice and will declared; that all other matters sent to the Council shall be determined by those of the Council who are present and the officers. Kerly, Hist. Eq., 17, 18.

7 1 Holdsworth, Hist. &c. 397–403.

cedure. These included *scire facias* upon recognizances, actions to annul the king's charters wrongly granted, petitions of right and traverses of office, most of this business having to do with rights of or against the king.[8] Petitions involving the exercise of the king's prerogative of grace were sometimes referred to the Chancellor in the latter years of the thirteenth century. By the ordinance of 8 Edward I, it was provided that all petitions touching the great seal should be referred in the first instance to the Chancellor, but this did not involve any special jurisdiction of an equitable nature.[9] Many petitions were referred to him during the reigns of Edward I and Edward II.[10] In some of these relief of an equitable nature was sought, and the endorsements referring them to Chancery directed the Chancellor to do what "ought to be done," "what justice demands," or according to "law and reason."[11]

The writ to the Sheriff of London, 22 Edward III,[12] directing that all matters of grace should go in the first instance to the Chancellor or to the keeper of the privy seal, seems to have been a temporary measure[13] nevertheless references to the Chancellor of cases of failure or inadequacy of the remedy at law became the rule from about this time. This followed not very long after final disappearance of the equity administered in the King's Bench and by bill in eyre.[14] Chancery as

8 1 Holdsworth, Hist. &c. 452; Kerly, Hist. Eq., 49. This part of the Chancellor's jurisdiction was not very important, and probably had very slight influence upon the development of the extraordinary jurisdiction in equity cases.

9 2 Stubbs Const. Hist., 263; Kerly, Hist. Eq., 26; 1 Holdsworth, Hist. &c. 401.

10 1 Lord Campbell, Lives of the Chancellors, 186, gives a list of nearly a dozen during the reign of Edw. I. Most of these involved no question of equity in the modern sense, as Kerly points out. Hist. Eq. 27. See 1 Campbell, *Ibid.* 209–212 for cases in reign of Edw. II. In some of these cases the petition is referred to the Chancellor and the Master of the Rolls, or to him and the Treasurer. That the Chancellor sat regularly for judicial business during Edw. II's reign and that he did not use juries is established by the records, but most of the questions involved seem to have turned on common law principles. In some of the petitions, however, it appeared that matters of grace only were involved, and some expressly state the absence of a remedy at law. 1 Campbell, 206, cited by Kerly, Hist. Eq., 29.

11 Kerly, Hist. Eq., 30.

12 Campbell, Chancellors, 1, 248.

13 See 1 Holdsworth, Hist. Eng. L. 401, 402; Kerly, Hist. Eq., 31.

14 See preceding section.

a court of equity regularly engaged in giving relief in cases where relief at law failed for any reason may fairly be regarded, therefore, as dating from about the middle of the fourteenth century. That Chancery was definitely recognized as a court about this time is established.[15] It is probable that the very meagre records of Chancery in the fourteenth century fail to give us the truth of the extent of Chancery's purely equitable jurisdiction during that time. From 1391, the 17th year of Richard II, petitions or bills presented to the Chancellor were preserved, and from that date we have abundant material showing the broad character of the relief afforded in Chancery during the fifteenth century, which is the counterpart in equity of the thirteenth century in the development of the common law. It is reasonable to infer that this equitable relief had been developing during the fourteenth century, with origins resting in the equity which had been administered by the judges.

But the Chancellor during this time was merely the representative of the Council, acting under its authority. In very many of the cases decided by him there is no doubt that his decisions and decrees operated as those of the Council. In many cases he acted with the advice and assistance of the judges. It is clear that the Council, Chancery and the judges were very closely related. As Professor Holdsworth says: "It was not until 1474[16] that we get a case in which the Chancellor made a decree of his own authority."[17]

We may now ask why it was that this equitable jurisdiction resting in the king's prerogative of grace and exercised through the Council, was referred to the Chancellor instead of to the judges. We have seen how the development of pleading and practice and narrow formalism in action and remedy made impossible the development of equity through the common law judges as part of that system.[18] But the king and Council could

15 14 Edw. III, St. 1, c. 5, Chancery is referred to as one of the courts; Rot. Parl. II, 154, clerks in Chancery obtained the privilege of being sued only in their own court.

16 Sel. Cas. Chan. (S. S.) 38.

17 1 Holdsworth, Hist. Eng. L. 404. "It is important to observe that throughout the fourteenth and most of the fifteenth century, the Chancellor was unable to act in these matters without the Council, and that the rendering of decrees was thus far always on the authority, not of the Chancellor, but of the Council." Baldwin, The King's Council, 246.

18 See preceding section.

have referred the early petitions seeking equity to the judges, giving them in those cases all the powers exercised by the Chancellor, so that equity could have developed with the law in the same courts, the two uniting in a complete system of law for the entire country. It is clear that there was no conscious purpose in the fourteenth century to create a new competing system of law in Chancery. The Chancellor acted as representative of the Council, and often with the aid of the judges. The Chancellor and judges, all members of the Council, must have represented most of the legal knowledge of that body, and the power and ability of the Chancellor was far greater than that of the judges. There was the closest sort of relation existing between them and the Council, and between the Chancellor and the judges. The development of Chancery as a court of equity was a gradual, almost casual development, the Chancellor being used by the Council as its instrument in these cases primarily because he and his office were best equipped to do the work. No doubt the great majority of the cases in which relief was sought because of failure of relief at law in the latter half of the fourteenth century were cases of outrage arising out of the state of civil war and lack of law enforcement which characterized the period. The defendant was complained of because he had overawed the regular common law officials, sheriffs, juries and judges. The Chancellor was the most powerful personage in the government, next to the king, and it was natural that he should be used to bring such malefactors to terms, rather than the judges of the common law, whose system of justice had broken down, making these petitions to king and Council necessary. At any rate Chancery as a court of equity had become established in fact, by the end of the fourteenth century, though in theory it acted as agent of the Council, and when in the fifteenth century equity in the modern sense was gradually displacing the early cases of outrage in Chancery, its character as a distinct court with a distinct and in many respects opposing and competing jurisdiction, had been too firmly established to be displaced by any union with the common law. We shall see that the most important part of Chancery's work in the fifteenth century was its jurisdiction over uses, and how impossible it would have been to accomplish the ends sought by the system of uses without a separate system

of equity and an equitable title distinct from the common law and the legal title.[19]

§ 4. Growth of Equity in the Fifteenth Century.—(*a*) *Common law jurisdiction.* Many of the cases in Chancery in the fifteenth century as in the fourteenth, were cases of outrage on the part of powerful defendants who were able to set the law at defiance, but these cases diminished in the latter part of the century as a more settled state of law and order was established. This jurisdiction eventually became obsolete with the transfer to the Star Chamber on its creation of matters of criminal equity, and the development of a more effective administration of criminal law.[1] The strictly common law jurisdiction of Chancery, never of much importance in the development of equity, requires no further comment. Relief for poor suitors, unable to pay for relief at law, as well as cases of outrage or defiance of law, fall outside the limits of equity as we are treating it, as in these cases purely legal rights were enforced. It has been said that the Chancellor used the forms and practice of the common law courts in these cases, applying the rules of the common law without modification in the interests of conscience and equity, but Professor Barbour says that by far the more reasonable inference is that these cases were tried and disposed of, as well as initiated, on principles of equity and conscience.[2]

(*b*) *Jurisdiction over uses.* The most important and significant part of the purely equitable jurisdiction of Chancery in the fifteenth century was its regulation and enforcement of uses. Cases involving uses start in the last years of the fourteenth

19 See § 4, subdiv. b, *post;* Maitland, Equity, 27, 28.

1 5 Holdsworth, Hist. Eng. L. 300. "The lawlessness of the fifteenth century . . . was being gradually checked by the Council and the Star Chamber," (referring to Vol. V, pp. 190–214). "At the same time cases of outrage occasionally came before the court of Chancery right down to Elizabeth's reign." These matters were generally left to the Star Chamber in the sixteenth century. *Ibid.* 300, n. 9.

2 Contract in Equity, 4 Oxford Studies, 83, 84. To the above cases should be added cases in which the transaction took place abroad. The petitions in these cases ran in the same form, and demanded relief in accordance with reason and conscience.

century. Uses developed so extensively that early in the sixteenth century nearly all the land of England was held subject to uses, and control over the actual enjoyment and transfer of real property passed to that extent from the common law courts to Chancery. The causes which brought about this state of things belongs to the history of the common law.[3] There is no doubt that the purpose of uses was mainly to avoid the rigors of the common law of land which forbad gifts of land by will and transfers *inter vivos* except by livery of seisin, transfer of possession, or its equivalent, and which still burdened military tenures with the burdens of wardship, marriage and other feudal incidents, the reasons for which were passing or had passed. By putting the legal title in a third person as trustee to uses, with full rights of possession, enjoyment and disposition in the *cestui que use* or beneficiary, these burdens and restrictions were segregated with the legal title in the trustee, where they could do no harm, as Chancery would and did promptly prevent for the most part enforcement thereof against the trustee in violation of the use or trust of the *cestui*. The *cestui* could convey or devise his beneficial interest as he pleased without particular formality. It is obvious that this result could not have been attained, and the real purpose of uses would have been defeated, if a separate court of equity, with a separate system of law, had not existed, ready to recognize the estate of the *cestui* and to protect it by its control *in personam* over persons who might attempt any use or disposition of the legal title of the trustee in violation of the use. It was necessary that the legal title should be separated from the real ownership of the property to accomplish this purpose. This made impossible in the fifteenth century the establishment in the law courts of a system of equity as part of the law and assured the development of equity as a separate system outside of the common law.[4]

[3] Walsh, Hist. Eng. & Am. Law, § 52; Digby, Hist. L. Real Prop. (5th Ed.), 320–328.

[4] "You will see that the success of this scheme would have been marred if the courts of law had compelled the feoffees to fulfil the honorable understanding by virtue of which they had acquired the land. If they had begun to say 'After all this land is the feoffor's land the feoffees are a mere screen or the feoffees are merely the feoffor's agents,' then the whole scheme would have broken down —wardship, marriages, forfeitures,

Uses existed to some extent in the thirteenth century. A remedy to enforce them by writ in the King's Court was a possibility, at least, in Bracton's time, as we have seen.[5] That the practice of conveying land to be held in this way had grown to considerable proportions during the reign of Edward III (1327–1377) is established by the fact that statutes were enacted to prevent uses to avoid creditors[6] and to prevent conveyances to uses by disseisors to powerful persons against whom the real owner would not dare to proceed.[7] Late in the fourteenth century a statute was enacted restraining the avoidance of the Statute of Mortmain by conveying to trustees to the use of religious houses.[8]

Before relief could be had in Chancery the *cestui* was at the mercy of the trustee, as the law courts refused to recognize the use for any purpose. The development of the common law under the limited forms of action heretofore described made impossible any effective method of enforcing uses at law. Chancery, therefore, gave relief because no remedy at all existed at law. The ecclesiastical courts were barred by a statute enacted in Henry II's reign from interfering with cases involving the freehold, so that they could give no relief to the *cestui.* Chancery alone could act in these cases. The Chancellor's court was especially well qualified to act, not only because it was developing a system of law outside of the common law, as explained above, but also because its procedure *in personam* was exactly adapted to compel specific compliance with the terms of the use on the part of the trustee.

Though Chancery may have and probably did give relief in these cases from the middle of the fourteenth century or earlier, the first application on record to protect a use was made to the Chancellor toward the end of Richard II's reign (1377–1379).[9] At first the use was enforced as the mere personal obligation of the trustee which could not be enforced

escheats would have followed as a matter of course." Maitland, Equity, 27–28. *Ibid.* 29, 32. That Chancery at this early time failed to bar the widow of the trustee from dower and the trustee's lord from escheat, see note 14, *post.*

[5] See § 1, note 12, *ante.*

[6] 50 Edw. III, Ch. 6. The recitals contained in this statute indicate many uses created for this purpose.

[7] Stat. 1 Rich. II, Ch. 9.

[8] 15 Rich. II, Ch. 5.

[9] Sel. Cases, Chan. 48, 69, *et seq.*

against his heir or alienee. In Edward IV's reign it was held that the heir of the trustee was bound by the use after the trustee's death[10] and that an alienee of the trustee was bound by the use unless he was a purchaser for value without notice of the use.[11] Some of the principal incidents of legal estates were applied to uses as estates in equity. Thus the use passed by inheritance to the heir or heirs exactly as the corresponding estate at law would pass.[12] Uses were held in fee, for life or for years as were corresponding estates at law, the interest of the *cestui* for a term of years passing to his personal representative as a chattel real.[13] On the other hand dower, curtesy, escheat, the rights of creditors, the rights of the lord to the feudal incidents of wardship and marriage, were some of the principles applying to estates at law which equity refused to extend to uses.[14] There can be no question that equity dealt with them as estates in land, almost from the beginning. This

10 Goold v. Pettit and Saunders v. Gaynesford, *temp.* Hen. VI (1422–1461), Cal. II, pp. XXVIII and XXXVIII, but see Y. B. 8 Edw. IV (1461–1483), to the contrary. See Digby, Hist. L. Real Prop. (5th Ed.) 326, 327; Huston, Enforcement of Equitable Decrees, 94.

11 Y. B. 5 Edw. IV, 7b.

12 Breggeland v. Calche, Cal. II, p. XXXVI; Y. B. 5 Edw. IV 7b; Digby, Hist. &c. (5th Ed.), 328; Maitland, Equity, 32, 33.

13 Digby, *op. cit.* 328; Maitland, Equity, 32, 33; Walsh, Property (2nd Ed.), 431.

14 See preceding note. The widow of the trustee took dower free of the use, and the trustee's lord took by escheat. Huston says (*op. cit.* p. 95): "The very case which enumerated these (heirs and donees of the trustee not purchasers for value without notice) as bound by the use distinguished the widow of the feoffee, who was agreed by the judges to take her dower right to her own use on the ground that she did not take through her husband's act or claim by him. The same rule governed the case of a lord taking by escheat," citing Y. B. (1522) 14 Henry VIII (Mich.), 4. In 1631, Nash v. Preston, Croke Car. 190, 191, the same position was taken as to dower in the trustee's widow, but in 1678 this case was overruled in Noel v. Jevon, 2 Freeman 43, and the rule was finally established that equity would bar dower in the widow of the trustee. Huston, id. 97, 98. That the *cestui* was not protected against judgment creditors was laid down in Y. B. 14 Henry VIII (Mich.), 4, but in Morley v. Martin (1673), Finch, 63, it was held that the interest of the *cestui* would be so protected. See Huston, id. 99, 100; Maitland, Equity, 117. The old rule as to escheat, apparently, was not definitely ended until the statute, 4 and 5 Wm. 4, c. 23 (1834). See Maitland, id. 120.

must be remembered when we come to the consideration of the nature of equitable rights hereafter.[15]

(*c*) *Jurisdiction in contract cases.* In the fifteenth century no remedy existed at common law for breach of contract unless the contract was under seal, when covenant would lie. If a debt for a specific sum existed the action of debt could be brought, but this action was based upon the recovery of the debt as the property of the plaintiff, not upon a breach of promise to pay on the defendant's part. No remedy existed for breach of contract not under seal where no debt for a fixed sum had been created.[16] There is no doubt that the Chancellor gave relief in cases of breach of parol contracts (including written contracts not under seal) where debt would not lie, because no relief could be had at law.[17] Petitions to the Chancellor were also made against vendors of chattels asking for damages in cases where detinue would not lie at law because the vendor had later sold the chattel to a third person. A sale of a chattel passed title so that the vendor could sue in debt for the price and the vendee could maintain detinue for the chattel as early as 1442.[18] But detinue would not lie against a subsequent purchaser from the vendor, so the vendee, in that case, sought damages for the breach of contract in equity.[19] If the sale fell through because the vendor had no

15 See § 19, *post.*

16 2 Poll. & Mait., Hist. &c. 182–218; Ames (1888) 2 Harv. L. Rev. 56; Walsh, Hist. &c. 408–414.

17 Thus where debt would not lie because no definite sum had been agreed upon. Barbour, 4 Oxford Studies, 105, notes 3 to 5; *ibid.* 106, note 1, citing a case possibly as early as 1391. So where the promise to pay was implied, there being no express promise. *Ibid.* 106, 107, & notes. Also in cases where a benefit was conferred upon a third person, because debt would not lie in such cases in the fifteenth century. Barbour, *ibid.* 107. Later debt would lie in such cases. Ames 8 Harv. L. Rev. 262, 263. See, also, 5 Holdsworth, Hist. Eng. L. 294. Prof. Barbour's monograph, based on a personal examination of a great number of the 300,000 petitions in Chancery from late in the fourteenth to early in the sixteenth centuries, is the outstanding authority on contract and equity in the fifteenth century.

18 Fortescue J. in Y. B. 20 Hen. VI, 35; Y. B. 21 Hen. VI, 55, Walsh, Hist. &c. 414, 438; Ames, Parol Contracts, in 3 Sel. Essays, 312, 313.

19 Barbour, 4 Oxford Studies, 115.

title, the vendee sought damages through Chancery.[20] The implied warranty of title in sales of chattels was still far in the future.

Contracts for the sale of land make up the most numerous class of contract cases enforced by Chancery in the fifteenth century. Usually no remedy existed at law because the agreement was by parol, not under seal in which case covenant would lie at law. Though most of the petitions recited that the price had been paid in whole or in part, or that the petitioner had otherwise changed his position because of the promise, these matters were not set forth as the basis of relief but rather the loss of the bargain. In several petitions no payment was stated, and apparently part performance was not a requisite to relief. There can be no doubt that the relief sought was almost always specific performance rather than damages, though most petitions merely asked for such relief as "reason and conscience" required. Petitions of this sort asking expressly for specific performance start with the reign of Richard II just at the close of the fourteenth century, and the number and character of the petitions and the fact that we have the record of decrees made in some of them make certain that specific performance was granted with considerable freedom during the fifteenth century.[21] Actions were brought by heirs, executors and assignees of the vendee, and also against heirs and successors of the vendor, against his feoffee to uses, and in some cases against his subsequent vendee, indicating progress toward the modern law of a trust in the vendee's favor.[22] Contracts of guarantee and indemnity, for personal services, for carriage and delivery of goods, are some of the other classes of cases in which relief was sought in equity because no remedy existed at law.[23]

The Chancellor enforced contracts, specifically or by awarding damages, on the broad general principle of "reason and conscience." How far this principle was carried over by ecclesiastical chancellors from the canon law is an interesting matter of speculative thought.[24] The "reason and conscience" of

20 *Ibid.* note 3; 5 Holdsworth, Hist. &c. 297.

21 Barbour, *ibid.* 116–122.

22 *Ibid.* 120 (2); 122, n. 5.

23 *Ibid.* 132–140.

24 Barbour, *ibid.* 156–158, citing Vinogradoff; 24 L. Q. Rev. 378; Barbour, 162–168; 5 Holdsworth, Hist. &c. 294–296.

organized society may in the final analysis fairly be regarded as the basis of all law. Here as in many other cases equity led the way in the reform of the law. Though part performance was not necessary to make contracts enforceable in equity, if the promise was purely gratuitous it was not enforced by the Chancellor. This was simply the application to executory contracts of a principle running back through the common law far into the early Germanic law, that a purely gratuitous executory transaction will not be enforced.[25] It is submitted that this is the true basis of the modern doctrine of consideration, and therefore the obvious explanation of Chancery's action is to be found here, without further seeking into the field of the common law or the doctrine of *causa* in the Roman law.[26]

In these contract cases, as in cases of uses the law gave no relief. When assumpsit, developing during the sixteenth century, gave adequate relief by way of damages in simple contract cases, equity relinquished that part of its jurisdiction,

[25] 2 Poll. & Mait. Hist. &c. 211, 212.

[26] See Walsh, Hist. &c. 427–433. "But deeds and specialties aside unexecuted gratuitous transactions of all kinds were void. This was why a *quid pro quo* was necessary to the validity of debts, why delivery or a *quid pro quo* was essential to gifts or transfers of chattels, why valuable consideration or consideration of blood or marriage was necessary to uses in equity created by bargain and sale and covenant to stand seised. This, of course, continued to be the reason why consideration in the form of benefit to the promisor, the *quid pro quo* of debt, continued to be necessary in cases of contract enforced by *indebitatus assumpsit*. It would seem to follow that this is the fundamental reason why detriment was required in actions of special assumpsit. If the plaintiff has given up or paid over something or suffered other detriment in consideration of the promise of the defendant, the promise is not gratuitous. The detriment makes it a promise which the law must deal with and enforce." *Ibid.* 432, 433. It may be added that the action of the Chancellor in the cases under discussion bears out exactly this theory of consideration, and as the development of assumpsit at law was undoubtedly forced on the law judges through this competing jurisdiction in equity, detriment may not have arisen so much from the original assumpsits in the form of actions on the case in deceit, which we must regard as the fictional form by means of which assumpsit as an action in contract was developed, as from this principle on which the Chancellor acted in contract cases, his jurisdiction therein being superseded in the sixteenth century by the development of assumpsit at law.

retaining cases of specific performance where damages was not an adequate remedy.[27]

(*d*) *Cases where a remedy at law existed, but the remedy was inadequate.* Cases of specific performances of contract, above discussed, constitute the most important and numerous group under this heading. The extent to which this form of relief was developed in the fifteenth century has been sufficiently explained above. Cases in Chancery for the specific recovery of chattels turn on the same principles. One of the outstanding failures of the early common law, never fully overcome even at the present day, was its failure to give adequate relief to the owner of chattels against a wrongful taker. Trespass was for a long time the only action where no bailment existed, and trespass, quasi-criminal in character in the fourteenth and fifteenth centuries, would lie only against the original wrongdoer, not against a purchaser from him, or one acquiring possession in any other way from the original trespasser.[28] In bailment cases detinue was the appropriate action against the bailee. The bailee could sue a wrongful taker in trespass, and from about the middle of the fourteenth century the bailor could also sue such a wrongful taker in trespass, judgment in favor of either barring action by the other, in cases of bailments at will.[29] But before the development of trover and conversion as an action on the case, this action developing from detinue *sur* trover, and becoming concurrent with trespass and trover in the latter part of the fifteenth and early in the sixteenth centuries,[30] there were many cases in which the owner had no remedy or at best a very uncertain one against persons, not trespassers or bailees, who might have possession of his chattels.[31] In any case, though he had a remedy in trespass, detinue, or detinue *sur* trover against third persons taking from the bailee, he could get damages only, not the chattels, since the judgment in detinue was always in the alternative, for the chattels or their value, and the defendant could always satisfy it by payment of the amount so fixed by the judgment. Replevin would lie only in cases of wrongful dis-

27 5 Holdsworth, Hist. &c. 294 *et sec.*, 301.

28 2 Poll. & Mait. 166, 167.

29 Walsh, Hist. &c. § 79.

30 *Ibid.*

31 *Ibid.* §§ 78, 79.

tress during this period.[32] Damages was often inadequate where the chattels had a peculiar value, like land, making specific relief the only adequate remedy. Many of the petitions of the fifteenth century were for the recovery of deeds, charters and other documents, proving that this branch of equity's jurisdiction goes back practically to the beginning of Chancery as a court of equity.[33] In these cases damages would be no real remedy; specific return by decree *in personam* was the only adequate relief. The Chancellor ordered the return of chattels in other cases irrespective of the technical requirements of trespass or detinue at law, though the defendant was not in privity with the trespasser or bailee. This relief in Chancery, and relief in similar cases by bills in eyre discussed in the preceding section, may be an answer to the question, How did people get along without a known remedy in such cases for so long a time?[34] After a complete remedy in trover and conversion had developed at law in these cases it was still inadequate where "reason and conscience" required the specific return of the chattels. This relief could be had only in equity, and we shall see that this is still true.[35]

(*e*) *Fraud and mistake* created situations where adequate relief could be had only in Chancery. A contract under seal was enforceable though it had been procured by fraud. Mistake was no defense at law to its enforcement. Though the defendant had paid his debt, if he left the bond in the possession of the creditor, he had no defense to its subsequent enforcement. In these and similar cases Chancery gave relief by compelling the surrender and cancellation of the bond, or by compelling the reformation of the instrument.[36]

(*f*) *Penalties* were the subject matter of some of the cases in Chancery in the fifteenth century. Thus a bond for double the amount of the debt, enforceable at law as made, was restricted in equity to the actual debt. A beginning was made in

32 *Ibid.*

33 Barbour, 4 Oxford Studies, 110–114.

34 See discussion, Walsh, Hist. &c. 318, 319, citing 2 Poll. & Mait. 166; Ames, Hist. of Trover, 3 Sel. Essays, 427, 428; 3 Holdsworth, Hist. (1st Ed.) 274–277.

35 See *post* § 60, n. 27.

36 5 Holdsworth, Hist. Eng. L. 292; Barbour, *ibid.* 84–97.

relieving mortgagors, though the equity of redemption as an equitable estate was still in the future.[37]

(*g*) *Injunctions to stay waste,* and to restrain other wrongful acts, though not common, and destined to develop for the most part in the eighteenth and nineteenth centuries, go back to the fifteenth century.[38] As specific relief of this kind was given by the king's judges of the thirteenth century[39] it would be surprising if these remedies did not exist in Chancery two centuries later.

(*h*) *The assignment of choses in action,* impossible at law because of the personal relation between debtor and creditor and in order to discourage maintenance, was given effect in Chancery in the fifteenth century. Barbour gives several clear instances of this.[40] The further development of assignability of choses in action will be treated hereafter.[40a]

Equity in the fifteenth century interfered to give relief in many other cases where because of technicality of procedure, defective methods of proof, and other shortcomings in the common law, adequate relief could be had only in equity.[41] By the early years of the sixteenth century Chancery had developed into a distinct court, primarily of equity, and equity as administered by this court, had grown to be a great system of law, outside of the common law, competing with it in many ways, many of its doctrines and rules supplementing the common law, and many more in direct opposition to it, though that opposition was to a considerable degree kept beneath the surface, through Chancery's enforcement of its decrees by personal control over the defendant, *in personam,* while judgments at law, whether in personal or real actions, were enforced *in rem* by the sheriff as officer of the court. The important gaps left by the defects in the common law were filled by equity in the ways above described. The growth of the common law in the

37 Barbour, *ibid.* 84–97. Holdsworth, Hist. Eng. L. 293.

38 5 Holdsworth, Hist. Eng. L. 287, 288.

39 See § 3, *ante.*

40 4 Oxford Studies, 108. On assignability of choses in action at law, see Walsh, Hist. &c. 335, *et seq.;* Ames, Disseisin of Chattels, 3 Sel. Essays, 584 *et seq.;* Holdsworth, Hist. of Choses in Action (1920), 33 Harv. L. Rev. 997, *et seq.*

40a *Post* § 19, notes 21–25.

41 Barbour, *op. cit.* 80, 81; 5 Holdsworth, Hist. Eng. L. 279, 280, 281, 286, 287.

sixteenth and seventeenth centuries was in a great measure due to the reforms introduced by equity as a competing jurisdiction. The Statute of Uses, converting uses not involving active duties on the trustee's part into legal estates, established the modern method of conveyance by deed.[42] The law courts found a way through the use of an action on the case in deceit, to establish assumpsit by which damages could be recovered for breach of contract, establishing the modern law of simple contract. This remedy was so effective that Chancery relinquished jurisdiction in contract cases except where the remedy of damages was inadequate and specific performance of the contract was necessary to give full relief.[43] The conflict between law and equity, and the resulting developments in the law as well as the final shaping of equity as a supplementing or modifying system, will now be considered.

§ 5. **Conflict Between Law and Equity.** The extensive jurisdiction of the Chancellor's Court, as described in the last section, was not attained without strong opposition, first from Parliament, and later from the law courts. The act of Parliament, 27 Edw. III, c. 1, the so-called statute of *praemunire,* was enacted a few years after the ordinance of Edward III directing that matters of grace should be referred to the Chancellor.[1] It denounced with severe penalties those "who so sue in any other court to defeat or impeach the judgment given in the King's Court." The Chancellor's jurisdiction in cases of outrage, discussed in the last two sections, met with vigorous protest from the Commons,[2] but the king and Council sustained the Chancellor against these and later attacks by the Commons, so that his jurisdiction continued unaffected by them. Parliament in effect confirmed his jurisdiction by a statute, 17 Rich. II, c. 26, which purported to regulate it by

42 Digby, Hist. L. Real Prop. (5th Ed.) 366–368; Walsh, Hist. &c. § 43.

43 5 Holdsworth, Hist. Eng. L. 322. For development of assumpsit see Ames, Hist. of Assumpsit (1888), 2 Harv. L. Rev. pp. 2 and 53; Barbour, *op. cit.* 40, *et seq.;* Walsh, Hist. &c. 414–427.

1 Phelps, Juridical Equity, § 10.

2 See their petitions, 3 Rich. II, No. 49, Rot. Parl. III, p. 44; 7 Rich. II, intro. to Close Rolls, p. XXIX, Spence, Court of Chancery, 2 Sel. Essays, 242.

providing that the Chancellor might award damages in favor of persons forced to appear before him without good reason, and under this statute sureties for such damages were required by the Chancellor on issuance of the writ of subpoena.[3] After the attacks of Parliament had subsided the law courts took up the struggle. The controversy finally took form in a single issue, whether Chancery could enjoin the enforcement of a judgment at law by injunction against the party in whose favor it had been made.[3a] Protests by judges and lawyers were ineffectual until, following the reformation, and the strengthening of the law by the development of assumpsit and actions on the case, Chancery's relative position was weakened. In the reign of James I the controversy came to a head between Chief Justice Coke and Ellesmere, Lord Chancellor. Swindlers who had been enjoined from enforcing a judgment secured by fraud and punished for violating the injunction, were induced by Coke to secure indictments against their opponents under the statute of *praemunire,* above referred to, for attacking a judgment of the King's Court. The Chancellor appealed to the king who referred the matter to a body of lawyers, including the Attorney General and Bacon, and they upheld the power of the Chancellor. This finally settled the power of Chancery to make good its decree, though directly opposed to the results in the same controversy at law, by the exercise of its power *in personam* over the parties to the litigation.[4]

In this way the supremacy of equity over the common law in cases of conflict was definitely and finally established. It has been quite usual for judges and legal writers to assert that no real conflict exists or can exist between law and equity; that equity developed to give relief, through its power to enforce decrees *in personam,* in cases where adequate relief could not be had at law in the form of judgments for damages enforced *in rem* only;[5] that no equitable title or ownership can

3 This statute made no provision for such security, but later the statute, 15 Hen. VI, c. 4, so provided. See Spence, *ibid.* 244, 245.

3a 1 Holdsworth, Hist. Eng. L. 459, 460.

4 Medley, Students Manual of Eng. Const. Hist. (3rd Ed.) 382. See also 21 Eng. Rep. 576; 2 Campbell, Lives of the Chancellors, 241. See Courtney v. Glanvil, Cro. Jac. 344; 1 Holdsworth, Hist. &c. 461–465.

5 Thus Professor Ames describes the fundamental differences between law and equity as follows,

exist except as fictions, as the trustee has the legal title, and therefore the *cestui que trust* has only a right *in personam* against the trustee,[6] that equity intervenes, not in opposition to legal rules, but only to supplement the law so that legal rights existing under those rules may be more completely or adequately protected.[7]

It is true that as a matter of form and procedure, equity did not directly attack legal rules or judgments. Either law or equity would have been overthrown in an unseemly struggle of that kind. But in every case in which the result reached in equity differed materially from the judgment a court of law would give there was, necessarily as a matter of simple fact, a direct conflict between the two systems of law. This is illustrated by practically every case in which equity acted in the period discussed in the preceding section where equitable, as distinguished from common law, relief was given, and is evidenced by further developments in equity during the sixteenth

"that the law acts *in rem*, while equity acts *in personam*. The difference between the judgment at law and the decree in equity goes to the root of the whole matter." Lectures in Legal Hist., 443, 444. See Adams, Equity (8th Ed., 1890).

6 "A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee." Ames, Harv. L. Rev. 9. To same effect Langdell, Summary of Equity Pleading (2nd Ed.) 210, 211.

7 "And the first thing that we have to observe is that this relation (of law and equity) was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would require." Maitland, Lectures on Equity, 18.

"Equity did not, as is sometimes said, set up a conflicting system of law in which it contested the existence of settled legal rights. Recognizing those rights, it insisted that the holder of them, if he acquired them or retained them unconscientiously, or if he used them unconscientiously when acquired, should be subjected to the decree of the Chancellor '*in personam*,' and that such decree should be framed in such manner as to render complete justice in accordance with the principles of equity." Stone (1912), 12 Col. L. Rev. 756. See, also, Langdell (1887), 1 Harv. L. Rev. 58; 13 Harv. L. Rev. 673, 677; Adams, Equity (8th Ed.), XXXIV.

and seventeenth centuries. At law in cases of uses prior to the Statute of Uses, and thereafter in cases of trusts, the *cestui que trust* was not recognized as having any rights whatever. In equity he was the real owner of the property. The legal title of the trustee was severed from all beneficial ownership, and carried with it the technical rules and feudal burdens of the common law which fettered legal ownership, so that they could be avoided and overcome by the administration of the use in equity.[8] In cases of simple contract before assumpsit developed, the plaintiff suing for breach of contract would be dismissed in the law courts. In equity he won his case. In actions for the recovery of chattels or their value where detinue or trespass would not lie, the plaintiff would lose at law but win in equity. It is true that in the last two classes of cases the development of assumpsit and of trover gave the plaintiff an adequate remedy at law in the sixteenth century, and equity relinquished its jurisdiction in these cases for that reason, retaining jurisdiction and giving specific relief only where money damages at law would not be an adequate remedy. The law courts were forced by equity's competition to make these reforms.[9] The development of equitable relief in cases of fraud, accord and satisfaction, payment, and other defenses to specialties in the fifteenth and sixteenth centuries, are additional illustrations of patent conflict. At law the instrument would be enforced. In equity it was declared void and the holder was compelled to cancel it, and to satisfy any judgment at law he might have recovered on it, and he was restrained by injunction from enforcing the instrument at law, or from enforcing any judgment which he might have secured by action at law.[10]

Every case in which equity intervened to correct a mutual mistake in a written instrument is another illustration. At law the instrument was enforced or given effect as made. In equity it was reformed so as to express the real intent of the parties.[11] The rule requiring profert of specialties and nego-

8 See § 4, *ante*.

9 See § 4, *ante*, also 5 Holdsworth, Hist. Eng. L. 322.

10 5 Holdsworth, Hist. Eng. L. 328, and cases cited; Glanvil v. Jennings, Nels. Ch. 129, 21 Eng. Rep. 807 (1669); Cannel v. Buckle, 2 P. Wms. 243, 24 Eng. Rep. 715 (1724).

11 5 Holdsworth, Hist. 326, 327. See, *post*, Chap. XXI.

tiable paper prevented their enforcement at law if lost or destroyed. Equity changed the law by permitting secondary evidence of their contents after proof of such loss or destruction, a reform which the law courts finally adopted. Here again the law was reformed through the conflict with equity.[12]

At law a married woman was deprived of the use, enjoyment and power of disposition of her real property, and her chattels passed to her husband on marriage, as did her choses in action and terms of years upon being reduced to possession by her husband. In the sixteenth and early seventeenth centuries equity modified this also by enforcing contracts between the husband and wife made before marriage by which the wife was given a limited power of disposition over her property, and by enforcing trusts created for the separate benefit of a married woman.[13] The conflict between law and equity is clear in cases where real property was devised or granted to a woman with an express provision that no right of curtesy should exist in the husband. As the wife took a legal estate curtesy attached at law, but equity intervened by impressing a trust on the husband, compelling him to turn over or account for what he received as tenant by curtesy to the successors in interest of his wife on her death.[14] Of course such a provision in a trust estate for the separate benefit of the wife prevented curtesy from attaching to her equitable estate, though in the sixteenth century equity recognized curtesy as attaching to trust estates, contrary to its former position in refusing to recognize curtesy in uses prior to the Statute of Uses.[15] Of the same character is equity's conflict with the law in an action by a third person against a husband or father to recover a loan made to a wife

12 Underwood v. Staney, 1 Ch. Cas. 77, 22 Eng. Rep. 703 (1666); Kelley v. Riggs, 2 Root 126 (Conn. 1794). Reed v. Brookman, 3 Term Rep. 151, 100 Eng. Rep. 504 (1789) is probably the first case in which a law court adopted the equity view in this matter. See Ames, Specialty Contracts and Equitable Defenses, in his Lectures on Legal Hist. 104; 1 Cook, Cas. Eq. 129. As to negotiable paper see Davies v. Dodd, 4 Price 176, 146 Eng. Rep. 431 (1817).

13 5 Holdsworth, Hist. &c. 310–315, in which is traced the origin and growth of this development in equity during the sixteenth and early seventeenth centuries.

14 Bennet v. Davis, 2 P. Wms. 316, 24 Eng. Rep. 746 (1725). See Walsh, Property (2nd Ed.) 218.

15 See Walsh, *ibid.* 218; Walsh, Hist. &c. 127, 203–204.

or child and used to purchase necessaries which the husband or father had refused or failed to provide. Though an action at law lies by a third person to recover the reasonable value of necessaries so supplied, no such action can be maintained to recover money loaned to buy such necessaries and used for that purpose. In either case the action may be maintained in equity.[16]

Equitable waste, though a particularly clear case of conflict which made even Professor Maitland doubtful of his position that no conflict between law and equity exists or has existed,[17] is merely another illustration differing in no essential respect in this matter of conflict. At law there is no waste, and therefore no remedy in these cases; in equity the plaintiff gets relief, an injunction and damages, or damages alone if the waste has been committed and no further waste is feared.[18]

Mortgages, illustrating the broad class of cases in which equity relieves from forfeitures, present a particularly striking instance of conflict between law and equity. At law, on default of the mortgagor the mortgagee became the absolute owner and he could recover the mortgage debt in addition. In equity he held the technical legal title to the mortgaged property to secure the debt due him, and was compelled to reconvey the legal title to the mortgagor on receipt of the amount of the debt.[19] To say that no conflict existed in these cases is

16 Marlow v. Pitfield, 1 P. Wms. 558, 24 Eng. Rep. 516 (1719); Harris v. Lee, 1 P. Wms. 482, 24 Eng. Rep. 482 (1718) and modern cases cited 1 Cook, Cas. Eq. 127, note.

17 Maitland, Equity, 157.

18 See § 27, *post*.

19 At first relief was given in the fifteenth century on the theory of relieving the mortgagor from a penalty. 5 Holdsworth, Hist. Eng. L. 293. But late in the sixteenth and early in the seventeenth centuries the mortgage had come to be regarded as intended to give the mortgagee security for the payment of the mortgage debt, leaving the substantial or real ownership in the mortgagor. Excuses for failure to pay on the due day, therefore, emphasized in the earlier cases, became immaterial, and the mortgagor was allowed to redeem after default in all cases except where he was barred by laches, the mortgagee was required to account for all profits received by him over and above the mortgage debt, with interest, and he could not interfere with the mortgagor's right of redemption by erecting improvements, and therefore could get no allowance for such improvements in the action to redeem. 5 Holdsworth, Hist. Eng. L. 331. The development of the action in foreclosure by which

simply to deny the facts. The extent to which the law judges were compelled as a practical matter to recognize the real ownership of the mortgagor is discussed hereafter.[20]

The nature of equitable rights and their relation to legal rights, of equitable title and legal title, as well as the force and effect of opposing rules in law and equity as part of the prevailing law, will be discussed hereafter.[21]

§ 6. Later History of Equity Prior to the Codes. The development of equity in the sixteenth and early seventeenth centuries has been indicated in the preceding section tracing the conflict between law and equity. Jurisdiction over contracts was cut down to cases calling for specific performance, and suits in equity for the recovery of chattels were restricted in equity to cases where money damages would not be adequate, the law having developed adequate relief in the form of assumpsit and trover for all other cases of contract and wrongful withholding of chattels in which equity had given relief in the fifteenth century.[1]

The Statute of Uses, enacted in 1535, by converting inactive uses into corresponding legal estates in the *cestui que use,* took away from Chancery a large part of its business relating to the ownership and disposition of lands. That statute did not apply, however, to uses for a term of years or where an active duty was imposed on the trustee or to equitable interests in personal property. These survived as equitable interests, therefore, and were called trusts to distinguish them from uses operated on by the statute which had become legal estates.[2]

equity cut off the mortgagor's right to redeem if he failed to do so after a date fixed by the decree in foreclosure, occurred about the same time. How v. Vigures (1628–1629), 1 Ch. Rep. 32–33; Holdsworth, *ibid.* 332. Fundamentally, relief to the mortgagor has always been based on the principle of relief from a forfeiture, such relief in turn having always been based upon giving to the mortgagor what was his in reason and conscience. Therefore this development was one of form rather than of substance; nevertheless we find in it the development of the mortgagor's equity of redemption, from relief in single instances to an equitable estate in the land in all cases of mortgages.

20 See § 24, *post.*

21 See § 19, *post.*

1 See §§ 4 and 5, *ante;* 5 Holdsworth, Hist. Eng. L. 300, 301, 321–323.

2 Digby, Hist. Real Prop. (5th Ed.) 370–372, 375; Walsh, Hist. &c.

Professor Ames has corrected the position sometimes taken that Tyrrell's case[3] decided about twenty years later, defeated the main purpose of the Statute of Uses by restoring inactive equitable estates as trusts. That case decided that since a use upon a use was void in equity at that time, the first use alone being enforceable, the second attempted use could not be converted into a legal estate by operation of the Statute of Uses. Thus a gift to A, to the use of B, to the use of C, created a valid use in B which was converted into a legal estate in B, but as the use in favor of C was held to be void in equity, there was nothing on which the Statute could operate, and therefore C took nothing under the Statute. When in the following century equity, losing sight of its original position, conveyance by way of use having become the normal method of transfer at law, held that B should be compelled to hold as trustee for the benefit of C, the purpose of the Statute to end inactive uses was defeated.[4] Thereafter trusts involving no active duty in the trustee could be freely created by the device of introducing another name in the form of a use upon a use, as above illustrated. However, most of the reasons making such uses objectionable had disappeared in the meantime. Equity had fully recognized the rights of creditors to reach trust estates, feudal rights of wardship and marriage had disappeared with the change of military tenures into socage tenure, wills of land had been established by the Statute of Wills, the rigors of the technical rules of conveyancing had been largely corrected by the new forms of conveyance which had developed under the Statute of Uses, and therefore the reasons which had led men in the fifteenth century to put the title in a third person as trustee for their use merely to separate title from ownership had mostly disappeared. Therefore inactive trusts were not created in any great number. Equity applied to trusts the general principle that rules of law governing corresponding legal estates should apply to them, removing most of the objections to inactive uses prior to the Statute of Uses. The development of trusts as an important branch of the law was

206–208; 4 Holdsworth, Hist. Eng. L. 463, 464; 5 *Ibid.* 304.

3 2 Dyer's Rep. 155a, 73 Eng. Rep. 252.

4 Ames, Lectures Legal Hist., 243–247; 4 Holdsworth, Hist. 472–473; 5 *Ibid.* 307–309.

carried forward a long way during the sixteenth and seventeenth centuries, the details of which fall outside the scope of this treatise.

The development of equity in cases of fraud, mistake, mortgages and other instances of relief from penalties during the sixteenth and seventeenth centuries has been outlined in the preceding section treating of the conflict between law and equity. Developments in equity's jurisdiction in cases of tort may best be taken up in the treatment of those branches of modern equity hereafter. Procedural developments will be discussed in the following chapter treating of the powers of a court of equity. We shall close this historical sketch of equity with a brief account of the attempt to merge law and equity under modern codes.

§ 7. **Merger of Law and Equity Under Modern Codes.** The development of equity outside of the common law resulted in the separate existence of two systems of law differing radically in substance, each with a distinct court and a distinct system of pleading and practice, and together constituting the sovereign law of the state. Therefore a party seeking relief in the wrong court had to start all over again. His suit could not be transferred from law to equity or from equity to law. Equitable defenses could not be set up in law actions; the defendant could establish his defense or other equity only by suit in equity to restrain the plaintiff from prosecuting his action at law, equity taking jurisdiction over the controversy in order that it might be disposed of on equitable principles. All this involved delay, expense, duplication of actions, and the scandal of different results in the same case if brought in one court instead of in the other. Every trace of the reasons which, as we have seen, made it inevitable that equity should develop outside the law, had disappeared. No reason existed why law and equity should not be merged in a single system of law with a single court and a common system of practice and pleading except the inertia and conservatism of bench and bar.

The demand for reform became so strong, that in spite of the hostility of what was probably a considerable majority of the lawyers and judges, New York led the way in 1848 by adopting the Code of Procedure, now generally known as the Old Code.

The fundamental principles of this statute, and the leading reforms which it purported to accomplish were: 1st, The consolidation or merger of procedure at law and in equity, the principal courts becoming courts of law and equity, without difference in action or procedure except that trial by jury was preserved in all cases triable by jury as actions at law prior to the Code and certain other legal institutions were expressly preserved, and except as differences in procedure necessarily continued in enforcing different forms of relief. The substantive side of law and equity were not changed; they were merely brought together into a single system, and therefore the enforcement of distinctively equitable and distinctively legal remedies involved necessarily differences of method and of procedure. 2nd, The substitution of a single action, the "civil action" for all the different forms of action then existing at law and in equity. 3rd, The abolishment of the technical rules of pleading and practice at common law so far as they differed from the rules of pleading and practice in equity, and the substitution therefor, so far as the nature of the subject-matter would permit, of the equitable rules of parties, pleading and final judgment.

The Code provided as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs which shall be denominated a civil action."[5] It is now established beyond any real doubt that this provision accomplishes what its language clearly expresses, a merger of all law and equity actions into a single action, started always in the same way, subject to the same rules of pleading and of parties, as well as to the same rules of procedure generally, whether the rights enforced are legal or equitable. The code makes no change in the substantive rules of the common law or equity, nor does it change the character and quality of the relief given. It has simply brought law and equity together in their actual practice and enforcement as coordinated branches

[5] N. Y. Code of Procedure § 69. By the provisions of the N. Y. Constitution of 1846 the court of Chancery was abolished and its jurisdiction and powers were vested in the Supreme Court.

of the law of the land as a single system, administered by the same judges in a single action, under the same rules of pleading and practice. Legal rights and equitable rights remain as distinct as ever, and the same facts must be pleaded and proved to get relief, whether legal or equitable, as before the Code. The relief granted also continues to be legal or equitable, but legal and equitable relief may now be given in the same action, in fact if a party fails to ask for and to secure all relief, both legal and equitable, to which he is entitled in the action, he cannot, after the final disposition of the case, bring another action on the same facts for further relief. He has had his day in court. A real merger of the substantive rules of law and equity necessarily results from the merger of courts and of procedure. It has always been true that in cases of conflict between law and equity, in the many cases of conflict, some of the more important of which are discussed in a preceding section [6] the rule in equity has been the only real law, the opposing rule at law being illusory and with no real force and effect, since it will be ineffective, and the enforcement of such a rule at law will be restrained by equity's power *in personam* over the parties to the controversy. The bringing together of the rules of law and equity in the same court and in the same form of action, to the end that complete relief both legal and equitable may be given in the same suit, results necessarily in overthrowing the illusory and conflicting rule at law and the establishment of the rule in equity as the controlling law of the case. That merger had taken place prior to the Code in certain directions by the adopting at law of the rule in equity is exemplified in the modern "lien" theory of mortgages, in the law of partnership and of assignment of choses in action in which the principles developed in equity are now merged in the general body of the law without conscious distinction of their origin. The validity in law actions brought to enforce bonds or negotiable instruments of such defenses as fraud, payment, accord and satisfaction and other equitable defenses to law actions such as mistake and equitable title, results from Code merger, as does the giving of both forms of relief in the same action, or one form of relief instead of the other as the facts pleaded and

[6] See § 5, *ante*.

proved may require. This question of merger is so important to an understanding of modern equity that a later chapter is devoted exclusively to it, and to the effect of the constitutional provisions preserving trial by jury upon the practical accomplishment of the reform.[7]

Twenty-nine other states and territories have substantially adopted the New York plan.[8] In twelve states law and equity are administered by the same courts, but each system is administered distinct and apart from the other. This method also prevails in the United States Federal Courts.[9] Only six states still retain separate courts of equity.[10] In most of the eighteen states without codes completely merging law and equity a very considerable degree of coordination between the two systems has been accomplished by special statutes providing for the easy transfer from one court to the other, or from one side of the court to the other, of actions mistakenly started at law instead of in equity or *vice versa* and by statutes permitting equitable defenses in law actions. These statutes will be discussed hereafter.[11]

In England an attempt was made to solve the problem in 1854 by the Common Law Procedure Act followed in 1858 by Lord Cairn's Act.[12] These gave to courts of law the power to grant injunctions and to give equitable relief of other kinds in

7 See Chapter IV, *post.*

8 Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Indiana, Iowa, Idaho, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Porto Rico, South Carolina, South Dakota, Utah, Washington, Wyoming and Wisconsin are the states and territories, besides New York, which have adopted the Code. See list of these states with dates when the code was adopted, in Clark, Code Pleading, 19. See Hepburn, Development of Code Pleading, 88, 89; Hinton, Cases on Code Pleading (2nd Ed.), 1. In four code states the Code expressly retains distinctions in practice and proceeding between law and equity cases. Ark. Dig. 1921, §§ 1030, 1033; Iowa Code, 1927, § 10940; Ky. Civ. Code Pr. 1927, §§ 4, 5; Oregon L. 1920, §§ 1, 389.

9 All the states not included in the above list, or among the six referred to in the following note which have separate courts of equity, fall within this class.

10 New Jersey, Delaware, Alabama, Arkansas, Mississippi and Tennessee are the six states referred to. See article by Ingersoll, 2 Yale L. Jour. 58; Clark, Code Pleading, 47.

11 See § 21, *post.*

12 17, 18 Vict. Ch. 125, §§ 68, 79, 83.

actions arising at law, and to courts of equity power to decide all questions of law that might arise in equity cases, to award damages and in other ways to give relief distinctively legal rather than equitable. These statutes failed to meet the situation. It was finally recognized that the reorganization of the courts as courts of law and equity combined was essential to any comprehensive reform. The first Judicature Act, enacted in 1873, came into operation in 1875. This statute, with subsequent amendments united the English courts of law and equity into a single court, the Supreme Court of Judicature of England, divided into two parts.[13] It provides that law and equity are to be administered concurrently, in accordance with rules stated in the Act;[14] that "in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law, with reference to the same matter, the Rules of Equity shall prevail."[15] The Judicature Acts contain a code of procedure simplifying practice and pleading and establishing a single system for all divisions of the new court.[16] In England, therefore, the merger of law and equity is as complete at least, as in New York or any of the other code states.

[13] 36, 37, Vict. Ch. 66, § 3.

[14] *Ibid.* § 24.

[15] *Ibid.* § 25.

[16] *Ibid.* § 23; 39, 40 Vict. Ch. 59, § 17; 44, 45, Vict. Ch. 68, § 19; 56, 57 Vict. Ch. 66; 58 Vict. Ch. 16, § 4. On the Judicature Acts generally see 1 Holdsworth, Hist. Eng. L. 638–648.

CHAPTER III

NATURE AND CHARACTERISTICS OF EQUITY; POWERS OF THE COURT

§ 8. **Precedent and Judicial Discretion in Equity.** Blackstone, describing Chancery at the end of the fifteenth century, said that "No regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved found a desultory and uncertain remedy, according to the private opinion of the Chancellor."[1] Professor Holdsworth says: "In early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The rule applied depended very much upon the ideas as to right and wrong possessed by each Chancellor. Hence there is a considerable amount of truth in Seldon's well-known aphorism. 'Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot.'"[2]

This picture of equity prior to the latter half of the seventeenth century is probably overdrawn. Reports of Chancery cases were only beginning in the latter half of the seventeenth century,[3] and were scarce and unreliable for about a century after they started.[4] It is no doubt true that the Chancellors of this earlier time did not rely on precedent in anything like

1 3 Bl. Comm. 53.

2 1 Holdsworth, Hist. Eng. L. 467, 468.

3 For an account of the history of equity reports see Barbour, 4 Oxford Studies, and Kerly, Hist. of Equity.

4 "The earlier reports, such as those of 'Tempore Finch' and 'Equity Cases Abridged' are often mere notes of the decisions without the facts of the cases, or the reasons of the judgments, and though Lord Hardwicke is moderately well reported by Atkyns, yet Lord Redesdale writing at the end of the eighteenth century, could still complain of the extreme scarcity of authority" . . . Kerly, Hist. Eq. 187.

the way the judges of the common law courts did. Nevertheless any general review of the development of equity in the fifteenth, sixteenth, and early seventeenth centuries proves that they had worked out a system of law which was constantly taking on more definite outlines. The law of uses prior to the Statute of Uses certainly does not sustain the charge of variability dependent on the individual Chancellor's idea of right and wrong. A system of property law based on reason and justice which for a considerable time determined the property rights of the great bulk of the people, developed in quite definite outline, and correcting the common law by eliminating incidents and burdens which had become obsolete with the passing of feudalism, indicates a conscious development of systematic law, not unrelated succession of single instances. Cases of instruments under seal procured by fraud, or when such obligations had been paid or otherwise discharged without surrender of the instrument, cases of mistake, penalties and forfeitures, prove that the relief given depended on the same fundamental principles on which equity acts today. Professor Barbour has shown quite convincingly that Chancery's jurisdiction over contract in the fifteenth century was based upon broad principles of public policy.[5] Reason and conscience as a broad general principle, not the individual Chancellor's idea of right and wrong in particular cases, determined what contracts should be enforced and what should not. Here as in other cases the enlightened "reason and conscience" of the time required that relief be given where otherwise the result at law would be obviously unjust, or where the general interests of the public were benefited by the enforcement of such contracts. Though many refinements were left to be worked out later, and the limits of equity's jurisdiction were not clearly defined, we have every reason for thinking that the development of equity was a steady progress of quite definite principles applied with an understanding of what Chancery had been doing in the past. Reports of decisions were practically nonexistent; nevertheless Chancery was a single highly organized court, with the Chancellor as the only judge, assisted by the Master of the Rolls, the Masters in Chancery and the clerks,

[5] Barbour, 4 Oxford Studies 166, 167.

and their knowledge of equitable principles and their understanding of the classes of cases in which relief had been given in the past must have been something very much more definite than what some of the writers on the equity of this early period would have us believe.[6] This is borne out by what they accomplished, as detailed in the preceding chapters.

We shall see clearly enough in the chapters treating the different divisions of modern equity that much the same process of development has gone on since the beginning of equity reports. There has been undoubtedly a more conscious reliance on precedent, and precedent has been followed in the development of modern equity much as at law. But equity, fundamentally, is based upon the power of the court to do what "reason and conscience" require in the particular case. This is as true today as it was in the fifteenth century, though the rules under which equity acts have been greatly developed and systematized. We shall see that these rules are framed so that relief may be given as "reason and conscience" require where the relief at law is inadequate. But even where a case falls directly within the rule calling for equitable relief there is always the reserved power in the court to withhold such relief if under the special facts of the case in hand justice requires that no relief be given, or that it be given only on special terms fixed by the court for that particular case. This question is to be determined according to the sound discretion of the court.[7] The practical application of any of the rules in equity requires the exercise of judicial discretion. The flexibility of equity needed to adapt its relief to special cases so that hard cases may be taken outside the operation of general rules where "reason and conscience" require it, is accomplished by this exercise of judicial discretion. May we not fairly conclude that this was always true, that equity in the early period as today acted in accordance with principles of general applica-

6 Thus Kerly says, Hist. Eq., 184; "All that practically existed to control or assist the individual inclination of the judge was the tradition of the Court, on some points, that is, those which most frequently occurred, no doubt strong and clear, on some uncertain and shifting, but on most entirely silent. A general idea existed as to the kind of case in which Chancery would or would not relieve, but that was all."

7 See Chap. XI, also § 104, *post.*

tion, but subject always to a discretionary power in the court of the same character? The rules have developed from early beginnings into a great system, but the saving grace of judicial discretion still modifies them. This judicial discretion, in the twentieth century as in the fifteenth, is not an arbitrary thing, and has no relation to the size of the judicial foot. Now as in the fifteenth century it must be exercised according to the enlightened "reason and conscience" of the time, subject at the present time to review on appeal, but its exercise sustained by the appellate court unless a clear violation has occurred.[8]

§ 9. Characteristics Distinguishing Equitable from Legal Relief. Chancery's method of enforcing her decrees by compelling the defendant to obey them under penalty of imprisonment was, no doubt, originally borrowed from the canon law.[9] How far this form of relief was used because it supplemented the forms of relief existing at law, and on the other hand, how far litigants were attracted to Chancery because this form of relief prevailed there, are matters of conjecture. We know that Chancery used this method of personal compulsion, *in personam,* exclusively during the earlier period, without resort to the method at law of giving a judgment adjudicating title to land or for damages enforced by execution through the sheriff. We have seen how the equity administered by the King's Court disappeared with the establishment of actions resulting in judgments for damages enforceable *in rem* by execution and that specific relief, which was the usual form of relief under the customary law of the local courts, was eliminated from the common law except as it continued in actions for the recovery of land.[10] In these cases as well as in actions for damages the judgment at law was enforced by execution *in rem,* the sheriff putting the plaintiff in possession of the land, or levying on and selling the defendant's personal property and applying the proceeds to the satisfaction of the judgment for damages.

[8] See Chap. XI, also § 104, *post.*

[9] Spence, Equitable Juris. 344; Huston, Enforcement of Equitable Decrees, 76. Langdell, Eq. Pleading, 35, *et seq.*

[10] See § 2, *ante.* Detinue and replevin gave no certain specific relief because the judgment could always be satisfied by payment of the value of the goods, as stated in the judgment, defendant keeping the goods.

Equity was able to give specific relief effectively because of her method of enforcing decrees *in personam*. In all cases of specific performance of contract and the specific recovery of chattels of unique value equity intervenes because justice demands that the plaintiff recover the specific thing for which he bargained or to which he is entitled, as money damages would not be an adequate substitute. In all cases of tort in which equity intervenes by injunction to restrain threatened acts of waste and trespass, nuisances, unfair competition in its various forms, violation of copyrights and patents, specific relief by way of prevention is required because damages at law would be inadequate. In cases of fraud and mistake, as well as in the many cases of various kinds in which justice demands that the defendant do or refrain from doing some specific act, equity is able to compel the specific thing which justice demands through this form of personal compulsion exerted upon the defendant. The extensive development of modern equity has resulted from a growing appreciation of the superiority of specific relief which gives to each party exactly what he is entitled to, over damages which is a substitutional form of relief, imperfect and incomplete in many cases.[11]

§ 10. Development in Equity of the Power to Act in Rem. How did it happen that Chancery in the early period of its history was confined to the contempt process in enforcing decrees? Surely in the fourteenth century the Chancellor, acting as a committee of king and Council, acting in the exercise of the reserved judicial power of the king as the source of all justice, must have actually had very extensive power whether he exercised it or not. Surely there was no good reason why he should not have made use of the sheriff as executive officer of the state and the process of execution to enforce a decree calling for the payment of a sum of money only, if that were more expedient than contempt process. Why should Chancery, developing as a great court administering an extensive system of law by delegated authority of king and Council, have not as-

11 Huston, Enforcement of Equitable Decrees, 5–12. That specific relief is the rule in the civil Law of Europe, damages being given where specific relief for practical reasons cannot be had, see Huston, *ibid.* Ch. 111.

serted and gained the power to transfer title *in rem* by force of its decree without resort to the practice of compelling a conveyance on the defendant's part? The answer seems to be that at first the Chancellor preferred to use the process which made his court so effective in giving relief where the law courts failed, and he probably felt no need of *in rem* enforcement. Later, the separate development of law and equity as competing and often antagonistic systems made it necessary, in order that open and destructive conflict might be avoided, that equity should, in form at least, refrain from invading the field of the common law courts, and the jealousy of those courts, sharply asserting that Chancery could act only by personal decree enforced *in personam*, for a long time made certain this result.[1] The recognition of the legal title in the trustee to uses, which was the foundation on which the system of uses in equity was based, necessarily involved a recognition of the exclusive power of courts of law to determine by their judgments *in rem* disputes involving legal title to land, leaving to equity power by personal control of the trustee to compel a formal conveyance to the *cestui que trust*.

It is odd that the law courts, in their long-continued controversy with equity, never raised the question of the validity of a conveyance made by the grantor under compulsion of equity's threat of possible imprisonment for life. As a matter of substance equity controlled the legal title very completely, though it refrained from asserting any right to do so directly by its decree. Today there seems to be no difference except one of mere form between adjudicating as to the legal title directly, and indirectly by a conveyance plainly forced on the grantor. The court in either case is the real power which accomplishes the result. This question is particularly interesting where the decree compels the conveyance of land lying outside the jurisdiction.[2]

1 J. R. v. M. P., Y. B. 37 Hen. VI, f. 13, pl. 3, 1 Ames, Cas. Eq. 1. Priscot, C. J., said—"The Chancery can do nothing but order him (the defendant) to prison, there to remain until he will obey, and that is all that the court can do"; Eq. Cas. Abr. 130, pl. 3; Cadell v. Smith, 3 Swanst. 308 (1791).

2 Cook, Powers of Courts of Equity (1915) 15 Col. L. Rev. 128, 129. See § 17, *post*.

That enforcement of decrees *in personam* by contempt process proved to be ineffective in many cases is shown by the practice used by Chancery in these cases in the latter part of the sixteenth and the early years of the seventeenth centuries. If the defendant failed to obey the decree after service of a writ for its execution, a writ of attachment was issued directing the sheriff to produce him before the court. If the sheriff failed to find him, a new attachment issued with public proclamation "that the defendant shall appear on pain of his allegiance to answer concerning the contempt." If that failed a commission of rebellion issued "to attach the defendant wherever he is found in the kingdom as a rebel and contemner of our law."[3]

When the defendant was finally imprisoned it was sometimes necessary to resort to severer measures to compel compliance with the decree, by close imprisonment, loading him with irons,[4] and by imposing fines.[5] The need of more effective measures led to the use of the writ of assistance in the reign of Elizabeth, at first to put the plaintiff into possession of the land in controversy until the defendant answered, and later to put the successful plaintiff in possession and keep him there until the defendant should obey the decree. The writ of assistance, thus initiated, has continued ever since as an effective means of enforcing decrees of equity awarding land to a plaintiff or to enforce foreclosure sales under statutes. Though used at first as simply another means of coercing the defendant, it operated *in rem* in that it gave the possession to the plaintiff, and that possession carried with it legal ownership against all the world other than the defendant who still had the legal title. But that legal title was an empty thing because any attempt by the defendant to enforce it would, of course, result in an injunction restraining such action. Nevertheless the technical legal title was still outstanding in the defendant, interfering with the plaintiff's power of disposition.[6]

3 West, Symboleography, Part II, 184, 185, 189; Huston, Enforcement of Equitable Decrees (1915) 77.

4 Clerk v. Walter, Monro, 718 (1598); 1 Spence, Equitable Jurisdiction (1846) 389 *et seq.*, cited by Huston *op. cit. supra* note 3, 79.

5 Arundel v. Arundel, Monro, 741 (1600); Awbrey v. George, Monro, 757 (1600); Huston, *op. cit. supra* note 3, 80.

6 West, *op. cit. supra* note 3, 189; Spence, *op. cit supra* note 4, 392; Huston, *op. cit. supra* note 3, 78, 80; 2 Eden, Law and Practice of

The writ of sequestration, which goes back to the time of Bacon, and probably earlier, was another means of compulsion directed against the defendant by sequestering his personal property and the income from his land, preventing him from enjoying them until he had obeyed the decree.[7] Later the practice developed to sell his chattels so sequestered and use the proceeds to satisfy the plaintiff's claim, if the decree called for the payment of money, and to pay fines imposed for contempt for failure to comply with the decree if it called for the execution of a deed or other acts. Here equity established a very effective means to enforce the decree by execution *in rem*. Assertions made by eminent authorities that these writs were personal, that they did not operate *in rem*, are simply contrary to the fact.[8] The plaintiff had the benefit of a sale of the defendant's goods and the application of the proceeds to the satisfaction of the decree quite as effectively as if a judgment at law had been enforced by execution.

It is clear, therefore, that any limitations upon equity's power to give relief by decree operating *in rem* or enforced

Injunctions (Waterman's Ed. 1852) 425, cited in Schenck v. Conover, 13 N. J. Eq. 220 (1860) as stating that "many precedents for injunctions to deliver possession after a decree and a commission or writ of assistance to the sheriff are in printed reports as early as the reign of Queen Elizabeth; and in a manuscript book of orders (which appears to have been taken from the registrar's books in the Hargrave Collection) there are a great many precedents of injunctions to deliver possession of lands after a decree, in the time of Henry VIII, Edward VI, and Mary." In Beatty v. De Forest, 27 N. J. Eq. 482 (1875), the court said: "In my opinion a purchaser under a decree, having a sheriff's deed, has as much right to the assistance of the court to be put in possession, as a plaintiff in a court of law has to an execution after judgment." See cases cited and discussed in the two cases last cited, especially Valentine v. Teller, Hopk. Ch. (N. Y. 1825) 480 (a leading case on the simplified procedure in enforcing writs of assistance). See, also, cases cited in 1 Cook, Cas. Eq. 75, n.

7 1 Daniel, Ch. Practice (Am. Ed. 1846) 627–629, 690–692; Bacon's Orders, in Powell, 35, 41; Hide v. Pettit, 1 Ch. Cas. 91–92 (1667); Wharam v. Broughton, 1 Ves. Sr. 180 (1848); Elvard v. Warren, 2 Ch. Rep. 192; Huston, *op. cit. supra* note 3, at 81–83.

8 Langdell, Summary of Equity Pleading (2d Ed. 1883) 35, n. 4, cited and discussed, Cook, *op. cit. supra* note 2, 113. See *ibid.* 110–115 for a full discussion of the problem.

in rem by execution, prior to the modern statutes which have almost completely swept away such limitations, are based partly on historical accident and principally upon the way in which equity developed outside the common law as a competing and corrective system of law, and all reason for continuing alive limitations of this kind have disappeared with the elimination of the struggle between law and equity. Modern statutory developments will now be considered.

§ 11. **Power to Act in Rem by Statute.** The difficulty of making stubborn defendants obey decrees led to the enactment in England of a statute, which took effect in 1830, and which provided that in case of failure or refusal of the defendant to execute a deed or other instrument as ordered by a decree, the court might authorize a master to execute it in the name and behalf of the defendant, with the same force and effect as though executed by the defendant.[9] In the United States the need of such statutes arose rather out of the ease by which the defendant could avoid contempt process by going from one state to another. Many states had enacted such statutes long before the English statute became law. The earliest of these was the Maryland statute, which provided that if the party should refuse or neglect to comply with a decree requiring him to make a conveyance, release or acquittance, "such decree shall stand, to be considered and taken in all courts of law and equity to have the same operation and effect as if the conveyance, release or acquittance had been executed conformably to such decree."[10] In Tennessee, in 1801, a statute was enacted providing that in equity the court should have the power "by decrees respecting titles to divest thereby (without conveyance from the party) the property of the person or persons against whom a decree shall be made." It then provides for the recording of such decrees in the register's office like deeds.[11] The Connecticut statute, enacted in 1807, is to the same effect.[12] The New Jersey statute, enacted in 1799, was the second of the state statutes

9 Huston, *op. cit. supra* note 3, at 13–16; English Contempts Act, (1830) § XV (15).

10 Act for Enlarging Powers of Chancery (1785), § XIII.

11 Roulestone's Laws (1792–1795) 246.

12 Enacted in May, 1807, reprinted in Huston, *op. cit. supra* note 3, 18.

giving this power to courts of equity. These are the typical American statutes, though many of the states, including New York, have followed the English form of requiring the execution of a deed in behalf of the defendant by a master, referee, or sheriff as officer of the court.[13] The deed so executed is, of course, merely a form by which the decree is made to operate *in rem*. It is in no sense the act of the defendant.[14]

Professor Huston shows that only four states, New Mexico, New Hampshire, South Carolina and Nevada, have no such statutes, and he points out that in Nevada the court acts *in rem* without the aid of any statute.[15] He might have added that in South Carolina the power to vest the title *in rem* by decree against a non-resident defendant served by publication is also definitely settled by the cases.[16] The statutes in many of the states are not broad enough, however, to cover all cases in which decrees might operate *in rem*, the question usually arising in cases of non-resident defendants served by publication in actions relating to land or other property within the state in which the action is brought. These cases will now be discussed.

§ 12. Effect and Enforcement of Decrees, Res in Same State; Specific Performance. In actions for specific performance of contracts for the sale of land in which the absent defendant is served by publication, the action, though based on breach of contract giving rise at law to a personal action for damages, is *in rem* for the recovery of the land in equity.

[13] See Huston, *op. cit. supra* note 3, at 19, also appendix of statutes, giving the statutes in the different states. Later statutes in England provide for the more direct method by so-called "vesting orders"—(1850) 15 & 16 Vict. c. 55; Trustee's Act (1893), 56 & 57 Vict. c. 61, § 14 (24).

[14] "A deed made in pursuance of a decree of a court of equity, executed by any other person than the legal owner, *proprio vigore*, would not convey the legal title. Such an instrument derives its entire strength from the decree." Coleman, J., in Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1891). The court holds that it was long-settled law in Alabama, without reference to any statute, that equity might invest the legal title by decree, overruling expressly Prewitt v. Ashford, 90 Ala. 294, 7 So. 831 (1890).

[15] Huston, *op. cit. supra* note 3, at 21; Robinson v. Kind, 23 Nev. 330, 47 Pac. 1977 (1896).

[16] Bush v. Aldrich, 110 S. C. 491, 96 S. E. 922 (1918).

Service by publication is nevertheless void in these cases if the decree cannot operate *in rem*, as the defendant must be served personally if the decree is to be enforced by contempt process *in personam*.[17] In states having statutes providing for enforcement of decrees *in rem* as explained in the preceding section, service by publication is valid as the action is *in rem*, resulting in a decree which, *proprio vigore*, transfers title to the plaintiff, either with or without a deed executed by an appointee of the court, depending on the terms of the statute.[18]

Silver Camp Mining Co. v. Dickert [19] was an action for specific performance of a contract to convey land in Montana in which the defendant, a non-resident, was served by publication. The court treats the action as *in personam* because the decree may be enforced against the defendant only by contempt process, *in personam*, and so holds that service by publication did not give the court jurisdiction, ignoring the provision of the Montana Code, copied from the New York Code, providing for conveyance *in rem* by the sheriff.[20] The original New York Code (1848) provided for a delivery of personal property by the sheriff if the defendant disobeyed an order for its delivery. In 1851 this provision was amended by providing for a conveyance of real property by the sheriff where the defendant had failed to obey a decree that he convey it.[21] In adopting the New York Code in California by the Practice Act of 1851, this amendment was apparently overlooked, and the original provision was adopted, and this provision was re-enacted in the California Code of 1872. Nevada and Idaho followed the California Code as a model, Idaho adopting this provision, Nevada omitting it, leaving Nevada without a statute providing for enforcement *in rem* of decrees for the transfer of either real or personal property. Nevertheless, without the aid of any statute, the

17 Spurr v. Scoville, 3 Cush. 578 (Mass. 1849); Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 78 Pac. 967 (1904).

18 Boswell's Lessee v. Otis, 9 How. 336 (U. S. 1850); Single v. Scott Paper Mfg. Co., 55 Fed. 553 (C. C. Ohio 1893); Bush v. Aldrich, *supra* note 16; Robinson v. Kind, *supra* note 15; Hollander v. Central Metal & C. Co., 109 Md. 131, 71 Atl. 442 (1908); Rouke v. McLaughlin, 38 Cal. 196 (1869).

19 *Supra* note 17.

20 Montana Code, adopted in 1895, nine years before this case was decided. See Huston, *op. cit. supra* note 3.

21 These provisions are now in N. Y. Civ. Prac. Act, §§ 978, 979.

Nevada court held in Robinson v. Kind[22] that a decree annulling a trust deed to land in Nevada operated *in rem* and as such was valid against the non-resident defendant served by publication. In California, though the Code has no provision for enforcement *in rem* of decrees for conveyances of land, the court has decided definitely that an action for specific performance of a contract to convey California land may be started by service by publication against a non-resident living in Ireland, and that a decree against him could be enforced by a conveyance made by a commissioner appointed by the court.[23] It ought to be sufficiently apparent that, in any code state in which law and equity have been merged in the same court and in which every action is both legal and equitable in that all rights of the parties, legal and equitable, must be adjudicated therein, the court has full power to give relief, either *in rem* or *in personam,* which the nature of the case calls for, irrespective of whether it would have been classed as a case in equity or a case at law under the old order. In Scadden Flat Co. v. Scadden,[24] the court relied on this merger and a general provision of the Code giving power without special provision therefor to use all the means necessary to give effect to the jurisdiction conferred on any court or officer and to use any process or mode of proceeding most conformable to the spirit of the Code. General provisions of the same character merging law and equity in the same court with power to grant both forms of relief in the same judgment, and to "enforce such judgment by execution against persons and property," was the basis of the decision in Bush v. Aldrich, referred to above, in which the court in South Carolina sustained as valid service by publication in an action for specific performance without the aid of any specific statute.[25] The development of

22 *Supra* note 15.

23 Rouke v. McLaughlin, *supra* note 18. In Waite v. Kern Riv. Co., 157 Cal. 16, 106 Pac. 98 (1909) the court relied on this case in deciding that it had the power apart from any statute, by its decree to transfer title to shares of stock situated in California, holding that the action for specific performance, though primarily *in personam,* is also *in rem* as to property within the state.

24 121 Cal. 33 (1898), referring to Calif. Code Civ. Proc. § 187.

25 *Supra* note 16, referring to Code, §§ 304, 335, 342 *et seq.;* 303. The court quotes from an early South Carolina case, "See also Bowder v. Schatzell, Bailey, Eq. 360–366, where the court said, 'But our courts do not always act *in*

the power of equity to act *in rem* as a result of modern developments by code, specific statutes and by decision, is well summed up by a Wisconsin judge: "In the early stages of equity jurisprudence decrees were enforced only *in personam*. This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity."[26]

In Massachusetts the case of Spurr v. Scoville, cited above, led to the Massachusetts statute providing for enforcement *in rem* of decrees. Under that statute, service by publication is valid when the decree sought may be enforced *in rem*.[27]

§ 13. Effect and Enforcement of Decrees; Res in Same State; Actions to Quiet Title. Bills to remove a cloud on title, when the defendant is outside the jurisdiction where the land involved is situated, raise in a very direct way the question of the power of the court to act *in rem*. The usual case has for its object the surrender and cancellation of an invalid instrument on which the defendant's claim to the land is based, and the cancellation of record thereof if it has been recorded, and also the barring of any future action by the defendant, the disputed question of right and title between the parties being finally determined in the action and decided by the decree which becomes *res adjudicata*, binding between the parties or their successors in any later action involving the same controversy.[28]

personam. It seems that they may act directly on the property, without the intervention of other parties; *and the title may be changed by the mere act of the court*, without any act of *the party*.' (Italics added). A large percentage of the titles to real estate in this state rests upon such decrees and judgments."

26 Timlin, J., in McMillan v. Barber Asphalt Paving Co., 151 Wis. 46, 53, 138 N. W. 94 (1912). It should be noted that Wisconsin is a code state.

27 Mass. Rev. Laws (1902) C. 147, § 17. This statute is very limited as it applies only to decrees enforcing trusts where the trustee is under 21, insane, outside the state, giving the court power to make a conveyance through a person appointed by the court when required to carry into effect the object of the trust. By a very free interpretation of this statute it is held that it applies to specific performance cases where a trust arises in favor of the plaintiff, making service by publication good. Felch v. Hooper, 119 Mass. 52 (1875); Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124 (1891).

28 See Cook, *op. cit. supra* note 2, at 136 *et seq.*

The plaintiff is given relief in equity because mere and conscience require that an invalid claim cloud his land, intolerable to remove, and he has no point of law, since he is in possession, or the land is vacant, so that he can start no action at law against the defendant to determine his title. If the defendant is in possession the plaintiff may sue him in ejectment, in the usual case, and equity will not act, as the legal remedy is adequate.

The purpose of the action is, stripped of verbiage and technicality, the remediation and final settlement of the disputed question of title to land in the jurisdiction where the plaintiff cannot sue a suit at law, and if he waits for a suit by the defendant, his evidence establishing the validity of the defendant's claim may be lost and in the meantime the marketability of his land is impaired. It is therefore, an action to try, settling a question of title to land within the state.[28] At law, a final judgment in ejectment is res adjudicata, finally settling all questions of title to the land between the parties. A decree in equity settling the title is just as truly res adjudicata between the parties both at law and in equity, to the great weight of authority.[29] Why then should not service by publication be quite as effective in these cases in equity as it undoubtedly is in the corresponding actions at law? Of course, in so far as the decree directs the surrender and cancellation of a document in the possession of a defendant outside the state, it can have no effect, as procedure by contempt

[28] See § 117, post, as to these actions.

[29] Ogsbury v. La Dange, 2 N. Y. 113 (1848); Williamsburg Savings Bank v. Town of Solon, 156 N. Y. 465, 32 N. E. 1058 (1898); Young v. Farwell, 165 N. Y. 342, 59 N. E. 145 (1901); Mutual Life Ins. Co. v. Shepman, 39 N. J. L. 371, 14 Atl. 758 (1877); Tunnell v. Clark, 35 N. J. Eq. 382 (1881); Harrington v. Harrington, 111 Mass. 517, 98 N. E. 905 (1912); Gossom v. Chapman, 141 Ark. 340, 217 S. W. 798 (1919); Fraser's Sec. Bank v. Evans, 30 Mich. 20, 21 N. W. 366 (1878); Ogle v. Tracy, 8 Ohio 203 (1837); Chouteau v. Gibson, 76 Mo. 38 (1882). Several of the above cases are reported in full in Cook, op. cit. supra note 6, at 77-85, and other cases are there cited. See also cases cited, Black, Judgments (2d Ed. 1891) §§ 317, 318; Freeman, Judgments (4th Ed. 1902) § 628. Prof. Cook says (op. cit. supra note 2, at 255): "So clear and unanimous are the united decisions upon this point that it is not worth while to give other examples of length." See Prof. Cook's discussion treating of this question and additional authorities cited by him, op. cit. supra note 6, at 75-85. See § 76, post.

process cannot be had upon the defendant was not personally served. But if the document is within the state, there is no reason why the court cannot seize it through its officer and destroy or cancel it.[31] Certainly the settlement of the question of title by a decree operating as *res adjudicata*, is the exercise of a power *in rem* over land within the jurisdiction of the court. No statute is required, differing in this respect from specific performance cases, as the decree operates *res adjudicata* to [illegible] the title, irrespective of actual surrender and cancellation of the instrument in question.

Yet in Hart v. Salmon,[32] the court by way of dictum asserted that in such an action the decree of the court could have no effect on the title. "It (the court of equity) has no inherent power, by the mere force of its decree, to annul a deed or to establish a title." Hart, defendant in the former action to quiet title, had been served by publication, but the bill in that suit set up no actual deed or other tangible claim of title in Hart, and the decree in the action in no way purported to annul the title which he actually had in the property, so that Hart was not actually bound by it. If Hart had appeared in that suit and had contested the title, the decree would have been *res adjudicata*, binding him in any later action involving the same matter, whether at law or in equity.[33] Therefore it would have operated in rem, the actual surrender and cancellation of Hart's paper title being quite immaterial. It follows that the court was wrong in the statement quoted above, and the authority on which the court relied was equally mistaken.[34] If the decree has this effect on land within the state, there is no reason why service by publication on the defendant should not have been good. Hart was not affected by the decree because it did not purport to annul his title. Lack of personal service was immaterial.

The statutes providing that decrees for conveyances may be given effect in rem do not apply in these cases. In a considerable number of states, however, statutes provide for actions to settle disputed titles irrespective of whether the plaintiff is in posses-

[31] See discussion of the physical power of courts of equity, Huston, *op. cit. supra* note 3, at 67–70; Cook, *op. cit. supra* note 2, at 137, n. 77.

[32] 110 U. S. 151, 3 Sup. Ct. 586 (1884).

[33] *Supra* note 30.

[34] The court cites Langdell, *op. cit. supra* note 8, at $\frac{33}{44}$ 43, 184.

sion or not, and irrespective, therefore, of the adequacy of the common law action in ejectment. These statutes provide that the judgment or decree in such actions shall operate *in rem* as settling the title between the parties, and under them there can be no doubt that service by publication on an absent defendant is valid.[35] But if the courts have the power to grant equitable relief in these cases, does not that power necessarily involve the power to cancel records in the state and settle the disputed title by decree, though no statute so expressly provides? In a West Virginia case brought to cancel a recorded contract of sale as a cloud on title, the non-resident defendant having been served by publication, and no statute existing giving *in rem* operation to the decree in such case, the court held that it had the power to make a decree which necessarily operated *in rem,* and therefore, service by publication was valid.[36] The court based its decision on the premise that its decree would operate

35 Calif. Code Civ. Proc. §§ 738, 749, 751; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557 (1890), Judge Brewer saying, the case involving the effect of a decree quieting title under such a statute in Nebraska:— "The question is not what a court of equity by virtue of its general powers and in the absence of a statute might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate." The court held that under such a statute, service by publication was valid as express power was given to determine the title by decree or judgment, distinguishing Hart v. Sansom, *supra* note 32, because in that case no such statute was involved. Other cases to the same effect are Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495 (1884); Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124 (1894). See § 13, *post.*

36 Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S. E. 387 (1910). The court pointed out that no relief could be secured in this case by an *in personam* decree enforced by contempt process; that relief "must come through the direct action of the decree upon the subject matter, or not all. But can it be possible that a court of equity is powerless to grant relief by way of cancelling a recorded writing which affects title to land within its jurisdiction, without it can obtain jurisdiction, of the defendant also? Is this the state of our law? Does equity never act except upon the person? Is a statute necessary to give equity jurisdiction to quiet title where it cannot get jurisdiction of the person of defendant? We do not think so. Equity has exercised jurisdiction to grant such relief, independent of statute, both in England and in this country, for more than a century." (Citing many cases).

in rem if the defendant were before the court, and therefore service by publication was valid, as the action was *in rem.* The court refers to Roller v. Holly [37] which sustained the jurisdiction of a Texas court to proceed against a non-resident without personal service to enforce an equitable lien for purchase money, though no statute existed authorizing such an action. This was on the ground that the action in equity was *in rem,* and the statute providing for service by publication applied to all actions *in rem,* whether at law or in equity. Surely the enforcement of equitable liens on land in the state against its non-resident owner cannot require personal service on him. To tie the hands of equity in that fashion would be to let a mere slogan "equity acts *in personam*" take the place of reason and common sense. When these cases are considered in connection with the great number of cases which hold that the decree of the court settles the questions litigated as *res adjudicata* between the parties, both at law and in equity as to any subsequent litigation of the same matter, the conclusion seems irresistible that the power to act by decree *in rem* is inherent in equity, and depends on no statute.

§ 14. Effect and Enforcement of Decrees—Interpleader. Cases of interpleader have presented questions of difficulty where one of the parties is a non-resident so that he must be served by publication. Equity gives relief in interpleader cases because the plaintiff is threatened with suits by two or more persons to recover the same debt or demand or personal property, though he is willing to pay the debt or deliver the property to the party lawfully entitled. The law gives no relief, and, therefore, equity permits him to deposit the thing or money due in court, and to bring in the different claimants that they may litigate their controversy among themselves, thus relieving the plaintiff from further responsibility in the matter. In an early case before Lord Eldon [38] before service by publication had developed in the law, the Chancellor held that interpleader would lie though some of the parties were outside the jurisdiction. It appeared that opposing claims were made for bills of exchange which had been placed in the plaintiff's hands for collection. Lord Eldon stated that if the plaintiff shows that he

[37] 176 U. S. 398, 20 Sup. Ct. 410 (1900).

[38] Stevenson v. Anderson, 2 Ves. & B. 407 (1814). As to interpleader generally, see § 119, *post.*

had used due diligence to bring in the non-residents to litigate the matter, on their default the court would enjoin forever any action they might bring against the plaintiff at any later time. Here the form of procedure *in personam* was preserved, though the effect would be to settle the matter finally *in rem* so far as the plaintiff's liability was concerned. In New York, the Court of Appeals held in 1907 that in an action brought by an assignee of a life insurance policy to establish and enforce a lien in favor of the plaintiffs against the amount due on the policy for advances made by the plaintiffs to pay premiums, the non-resident heirs of the deceased insured could be served by publication, as the action was to "define and enforce an interest in specific personal property within the state," as the *situs* of the debt under the policy was in New York.[39] Though this action was not in the form of interpleader, it was substantially so, and the order of service by publication was sustained because the action was to determine *in rem* the ownership and liens upon the debt due under the insurance policy taken out in New York by a resident of the state in an insurance company doing business under its laws.

Nevertheless in 1921 the same court arrived at a directly contrary result.[40] It appeared in that case that on the death of the assured, conflicting claims were made to the insurance money payable under the certificates of insurance which had been issued to him, by his personal representative, the representative of his widow, his son and other persons. The Insurance Association interpleaded all these persons, the representative of the widow's estate being served by publication, and a final judgment was rendered under which the insurance money was paid to the representative of the assured. Shortly after this the representative of the widow's estate got judgment for the same money against the insurance association in Maryland, that court rejecting the New York judgment as a defense because the widow's representative had not appeared or been personally served in the New York suit. This action was later brought in New York on that Maryland judgment. The Court of Appeals sustained the validity of the Maryland judgment, and held that the New York

39 Morgan v. Mutual Ben. Life Ins. Co., 189 N. Y. 447, 82 N. E. 438 (1907).

40 Hanna v. Stedman, 230 N. Y. 326, 130 N. E. 566 (1921).

interpleader was void as to the widow's estate because personal jurisdiction had not been secured. The court admits that if the interpleader suit was an action *in rem* or affecting personal property within the state, service by publication would have been valid, but holds that the interpleader suit determined a personal claim, not ownership of a thing *in rem*, and was therefore strictly a personal action. The court followed a United States Supreme Court case[41] in which it appeared that a dispute arose as to the ownership of the surrender value of a policy of insurance between the assured and his daughter, who claimed it by assignment from her father. A judgment creditor of the daughter sought to reach it by garnishment. The insurance company interpleaded the parties, serving the daughter by publication, and the decision was in favor of the father's ownership. In the later suit brought by the daughter in California against the insurance company, this interpleader decree was held void because the daughter had not been personally served. In the final determination of the case on appeal to the Supreme Court, Judge McReynolds said: "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the court had ample power to condemn and appropriate it (her claim against the company) so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. But the interpleader initiated by the company was an entirely different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts."

It is submitted that the weakness of these cases could not be better expressed than by the quotation above. The right to the surrender value of the policy was property to pay debts, but was not property when its ownership between father and daughter was litigated in the interpleader suit. In the Morgan case, *supra,* the Court of Appeals was right in holding that a claim on an insurance policy is property, the ownership of which may be determined *in rem* after service by publication on one of the claimants. If it is property for garnishment proceedings

41 N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518, 36 Sup. Ct. 613 (1916). To same effect, Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 130 (1877).

it is property for settlement of its ownership between conflicting claimants by interpleader, and such suits are, therefore, *in rem*, permitting service by publication.

While the Hanna case was before the Court of Appeals, the New York Appellate Division, First Department, had reversed a judgment and sent the case back for a new trial in a case which also involved the settlement of conflicting claims under a policy of insurance, the beneficiary, a resident of Austria, having been served by publication, the Appellate Division having sustained that service as valid on the authority of the Morgan case, discussed above. After the second trial, the case was again brought up on appeal to the Appellate Division. In the meantime the Hanna case had been decided. The Appellate Division was forced to reverse its former position, Clark, P. J., saying: "But it is our duty to follow as well as we can the law as laid down by the Court of Appeals, and in view of the emphatic rejection of the *in rem* theory in the Hanna case I feel bound to accept its *latest* views (italics added) and concur in the reversal of this judgment."[42]

When results of this kind follow from a failure to recognize a chose in action as property between conflicting claimants, though it is property for purposes of taxation, of application to payment of debts, of settlement of estates, and generally for all other purposes wherever its character as property is material, it would seem to follow that a prompt reconsideration of this question by the United States Supreme Court and by the Court of Appeals is urgently needed.

It should be noted that these cases expressly recognize the power of the court to act *in rem* in interpleader cases in which the ownership of a specific *res* within the state is in dispute, permitting service by publication. They are decided on the narrow ground that where the controversy relates to conflicting rights to a chose in action the interpleader suit is *in personam*, not *in rem*, merely because the direct enforcement of the chose against the debtor by either party would be necessarily *in per-*

[42] Schoenholz v. N. Y. Life Ins. Co., 197 App. Div. 91, 188 N. Y. Supp. 596 (1921), *aff'd* 234 N. Y. 24, 136 N. E. 227 (1922), the Court of Appeals, however, deciding the case on the ground that the plaintiff had acquired no rights under the policy either at law or in equity, assuming, without deciding, that the action was *in rem*.

sonam, a clear case of *non sequitur.*[43] Here again the power of a mere slogan, "Equity acts *in personam,*" causes a departure from the exercise of reason and common sense in failure to grant relief which justice and public policy demand. Lord Eldon recognized the need of such relief in Stevenson v. Anderson, *supra,* and decreed accordingly. Certainly the courts should grant relief in interpleader cases in favor of a resident plaintiff against non-resident defendants, otherwise he must submit to the vexation and expense of defending two or more suits in which he has no interest as he stands ready to deliver the thing or pay the debt or other claims to any one of the claimants who may be entitled to it. An outworn maxim based on nothing but the ancient struggle between law and equity is no excuse for the failure of the courts to perform their plain duty in these cases in the administration of justice.[44]

The power of equity to act *in rem* so as to transfer title held by trustees who are infants, married women or *non compos mentis,* goes back to early statutes in England.[45] The need of this power is so self-evident that it would probably be recognized today everywhere in the absence of statute, as an essential element of control in equity over trusts, though statutes so providing seem to be universal.[46]

May we not fairly conclude, therefore, that the inherent power of equity to act *in rem,* always existing but exercised rarely while the struggle between law and equity was in progress, now exists as completely as at law in any case in which relief *in rem* may be more effective to accomplish the results which justice demands? The statutes giving such power in the more obvious cases were necessary because of the conservatism of lawyers and judges, which causes them to follow ancient and time-honored

43 For a treatment of choses in action as property see Walsh, History of Eng. and Amer. Law (1923) 339–344.

44 See Huston, *op. cit. supra* note 3, at 65, 66, arguing that a specific statute should be enacted covering these cases. A statute, however, would seem to be unnecessary if the courts will recognize their powers.

45 Infants (1708), Anne c. 19; trustees *non compos mentis* (1731), 4 Geo. II, c. 10; Ames, Cases on the Law of Trusts (2d Ed. 1893) 217, 218, notes.

46 Glen v. Williams, 60 Md. 93, 119–120 (1883); Huston, *op. cit. supra* note 3, at 66.

maxims or slogans without analysis or thought long after all reason for them has ceased to exist. These statutes should be regarded of themselves, if that were necessary, as establishing this principle. Surely a uniform and almost universal statutory development establishing equity's power to act *in rem* in most of the more important classes of cases must be recognized, as truly as the cases so deciding without the aid of statutes, as steps, historically, by which equity has grown in power so that it may now do equity in the fullest sense free of the restraining influence of this ancient and outgrown maxim, "Equity acts *in personam.*"

§ 15. Enforcement of Decrees for the Payment of Money. From the first, as we have seen, equity granted decrees for the payment of fixed sums of money. Cases of account, not only against trustees of express trusts, but against agents and between partners, cases of parol contracts in the fifteenth century in which specific performance was impracticable, are a few of the many cases of this kind.[1] We have seen how the process of sequestration was used to enforce decrees for money, developing into execution *in rem* differing little from enforcement of judgments at law.[2] There seems to have been no good reason why the established forms of execution at law enforced through the sheriff should not have been used by equity in these cases—equity used the sheriff freely as an executive officer of the law in many other cases—but apparently this was never done until by modern statutes power to issue execution through the sheriff was expressly given to enforce decrees for money. Today this power exists everywhere.[3] In these cases, therefore, equity's power is entirely freed from the limitations of execution *in personam* by contempt process. There is no doubt that this is merely an additional power, in no way modifying the use of contempt process and sequestration. One or all may be used to enforce the decree.[4] But statutes and state con-

1 See § 4, *ante.*

2 See § 10, *ante.*

3 1 & 2 Vict. c. 110, §§ 18, 19; N. Y. Rev. St. 1829, pt. III c. 1, tit. 11, § 104; Paterson's Laws of N. J., 1703–1800, 433; Cal. Code Civ. Pr. § 684; Ill. Hurd's Stats. (1909) c. 22, § 47; U. S. Eq. Rules VIII; Hosack v. Rogers, 11 Paige, 603, 606 (N. Y. 1845); Manning v. Mercant. Sec. Co., 242 Ill. 584, 90 N. E. 238 (1909).

4 Wightman v. Wightman, 45 Ill. 167 (1867); Tolman v. Leonard, 6

statutional provisions forbidding imprisonment for debt make impossible the use of contempt process to enforce decrees for debts or other purely contractual obligations which may now be enforced only by executing.[5] These statutes, however, do not apply where equitable relief other than a decree for the mere payment of a debt or obligation in contract is involved, such as specific performance, decrees against trustees, decrees for alimony and the like. Thus the vendee as defendant in an action of specific performance may be compelled to pay the purchase price by contempt process. Specific relief requires the specific act of payment, which is not payment of a debt, though the decree is for the payment of money.[6] A decree for the payment of alimony is subject to the same rule.[7] The decree in these and similar cases enforces something more than the payment of a debt. Distinctive equitable relief is not affected by statutes forbidding imprisonment for debt.

§ 16. **Binding Effect of Decrees as Res Adjudicata.** It has been stated by a leading authority that "a decree in chancery has not in itself (i. e., independently of what may be done under it) any legal operation whatever." In other words it is not *res adjudicata* of the controversy between the parties involving the same controversy.[1] This was undoubtedly the law in Coke's time and earlier,[2] but fortunately this exceedingly narrow view has been almost completely obliterated in modern times. The normal development of equity as an essential part of the general law governing men's affairs made impossible any such view of the action in equity and the resulting decree. This

App. D. C. 224 (1895); Nat. Docks &c. R. Co. v. Penn. R. Co., 54 N. J. Eq. 167, 33 Atl. 936 (1896); 1 Cook Cas. Eq. 27–32.

5 Nelson, Morris & Co. v. Hill, 89 Fed. 477 (1898); Clements v. Tillman, 79 Ga. 451, 5 S. E. 194 (1887).

6 Camden v. Mayhaw, 129 U. S. 73 (1889); Brasher's Exrs. v. Cortlandt, 2 Johns Ch. 505 (N. Y. 1817).

7 Wightman v. Wightman, note 4, *supra*. See other cases cited in note 4, above. It has been held in New York that the collection of alimony by contempt process will not be allowed unless the court is satisfied that payment by sequestration will fail. People ex rel. Allen v. Wagner, 117 Misc. 526 (1921) based on Civ. Pr. Act, § 1172.

1 Langdell, Summary of Equity Pleading (2nd Ed.), 35.

2 J. R. v. M. P. (1459) Y. B. 37 Hen. VI, Fol. 13, Pl. 3; 1 Ames, Cas. Eq. 1. See *dictum*, Davidson v. Sharpe, 28 N. C. 14 (1845), to the same effect.

view of equity was never possible except by excluding the real effect of equity's action, and centering attention on the form of procedure, *in personam*, by which equitable relief was given, by ignoring the substance and giving sole attention to mere form. It is now settled law, not only in code states in which law and equity have been merged in a single system, but also in states like New Jersey, in which equity is still separate and distinct, that a decree in equity made after trial on the merits, settles the controversy between the parties so that it is *res adjudicata* in any later action between the same parties involving the same matter, both in equity and at law.[3] No other view is possible in England and the thirty code states and territories in which law and equity are merged in a single system, in which every action must finally settle all questions at issue between the parties, both legal and equitable. In Young v. Farwell, cited in the last note, a decree of the Illinois Court of Equity was held to be a bar to the suit at law in New York as being *res adjudicata*. The court said: "It makes no difference that the judgment, or decree, set up by way of estoppel, was one rendered in an equitable action for an accounting; provided that the question involved in this common law action was involved and determined in the equity action. That a decree rendered in a cause, depending between parties in equity, may be a bar to an action at law between them cannot be questioned. It turns upon the scope of the decree . . . a prior judgment, whether rendered in an action at law, or in equity, concludes the

[3] Ogsbury v. La Farge, 2 N. Y. 113 (1848); Williamsburg Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (1893); Young v. Farwell, 165 N. Y. 341, 59 N. E. 143 (1901); Mutual Life Ins. Co. v. Shipman, 50 N. J. L. 571, 14 Atl. 756 (1888); Putman v. Clark, 34 N. J. Eq. 532 (1881); Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903 (1891); Greeson v. Cannon, 141 Ark. 540, 217 S. W. 786 (1920); People's Sav. Bank v. Eberts, 96 Mich. 396, 55 N. W. 996 (1893); Coit v. Tracy, 8 Conn. 268 (1830); Chouteau v. Gibson 76 Mo. 38 (1882). Several of the above cases are reported in full in 1 Cook, Cas. Eq., 77–88, and other cases are there cited. See also cases cited Black, Judgments (2nd Ed.), §§ 517, 518; Freeman, Judgments, 4th Ed., § 428. Prof. Cook says ([1915] 15 Col. L. Rev. at p. 233): "So clear and unanimous are the modern cases upon this point that it is not worth while to give other examples at length." See Prof. Cook's discussion treating of this question and additional authorities cited by him (1915), 15 Col. L. Rev. 228–234.

parties upon the material issues and is conclusive as to all facts comprehended within the issues submitted, which were relevant and material and which were so related to the issues that their determination was necessarily involved." In Mutual Life Ins. Co. v. Shipman, above cited, the New Jersey Court of Law, holding that a decree of the court of equity in that state was *res adjudicata*, said: "It is settled that a verdict and judgment of a court of record or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit." It is apparent, therefore, that the doctrine does not depend upon the merger of law and equity under the codes; that it is based fundamentally on the recognition of equity and its decrees as part of the law of the state, entitled to the same respect and binding effect between litigants as judgments at law.

It is true, of course, that the court of equity, like a court of law, must have jurisdiction sufficient to make the decree. In discussing the power of equity to act *in rem* we have seen that a personal decree against a defendant who has been served only by publication, without personal appearance by him, is void. In the interpleader cases and cases of quieting title discussed in foregoing sections the court refused to recognize the decree in several cases because, as the court regarded it, a personal decree against the defendant was secured without personal appearance or service, and it was void for that reason. If, however, the decree operated *in rem* to determine the disputed question of ownership of the thing involved, whether the land in the cases of quieting title or the chose in action in the interpleader cases, the court's jurisdiction *in rem* made the decree effective, and its recognition as *res adjudicata* should follow.[4]

Actions at law or in equity brought on foreign decrees will be discussed in the following section. We shall see that decrees for money and decrees of other kinds as well are recognized as valid, like judgments at law, for the purpose of such actions. Where, however, a controversy has been finally determined in an action in equity and a decree has been made, but the decree, following the usual *in personam* form of decrees in equity, orders the surrender of an instrument for cancellation for fraud

[4] See §§ 13 and 14, *ante*.

and restrains the defendant from suing on the instrument, or directs the reformation of an instrument because of mutual mistake, or in any other case orders specific relief by *in personam* decree, will the decree be given effect at law in the same state or in another state as *res adjudicata* of the substantial rights of the parties, though the defendant has failed to obey the decree and has avoided contempt process by leaving the state? Undoubtedly the decree may be enforced by action thereon in any state where the defendant may be found, as the cases discussed in the following section establish. By weight of authority the decree will also be *res adjudicata* as a defense to any action at law brought by the defendant involving the controversy finally settled by the decree. The actual enforcement of the decree is mere matter of execution; the substantive rights of the parties are finally determined in the equity action and its resulting decree. Though in England and the code states no other result is possible, as we shall see,[5] and nearly all of the remaining states have special statutes permitting the setting up of equitable defenses in law actions under which a decree in equity set up as a defense must necessarily be recognized,[6] yet the binding effect of the decree as *res adjudicata* has been settled so overwhelmingly by the cases without reference to Code or special statute, and that doctrine is so necessarily sound and expedient in any orderly administration of the law, that it must be accepted as generally established.

Cases holding that a temporary injunction restraining a party from prosecuting an action at law does not make invalid a judgment at law secured by the party in violation of the injunction are entirely consistent with this principle. The judgment at law would be valid in any event, though a permanent injunction had been obtained, and the law court had overruled it as a defense specifically pleaded as *res adjudicata*. Under the doctrine stated above such a judgment would be reversed on appeal as erroneous, but no question of its validity until so set aside has ever been urged seriously. In Platt v. Woodruff,[7] the injunction was a temporary one, vacated as improper after the judgment at law was secured, and that judgment was rendered without knowledge by the court of the injunction

5 See § 21, *post*.

6 See § 21, *post*.

7 61 N. Y. 378 (1875).

which had not been set up as a defense. Of course the judgment was valid on any theory. So, also, cases holding that transfer of a negotiable instrument to a holder in due course, though the instrument has been declared void in equity and ordered to be canceled, gives the transferee an indefeasible title, are in no way inconsistent, The doctrine of purchaser for value without notice was created in equity as a limitation upon equitable rights. The equity of the innocent purchaser is treated as equal to that of the maker, and his legal title is therefore enforced free of the maker's equity. The decree in equity creates a right in equity, which under equitable rules is cut off if the legal title to the instrument is transferred to an innocent purchaser for value.[8]

We have seen that by statute practically everywhere equitable decrees *in rem* operate to transfer or establish title as effectively as corresponding judgments at law, and that by weight of authority, history and reason, they so operate irrespective of statute.[9] Personal decrees finally settling personal rights and liabilities between the parties must for similar reasons be treated as conclusive, irrespective of whether they have been enforced *in personam* or not. The effect of decrees of all kinds as the basis for actions at law or in equity in other states will now be considered.

§ 17. Enforcement of Foreign Decrees. It is familiar law that a judgment at law takes the place of the chose in action on which it was recovered, and that an action may be maintained on the judgment in the same state or in any other state against the judgment debtor whenever there may be occasion to recover a new judgment in order more effectively to enforce the obligation. In England the law courts at first refused to recognize a decree for money in equity as creating a debt on which an action at law could be maintained. Though an action on a judgment recovered against the defendant in a foreign state was good, the rivalry between law and equity led to the indefensible position that no action at law would lie on a decree for money in equity.[1] Later it was held that an action of debt

8 Winston v. Westfeldt, 22 Ala. 760 (1853), 1 Ames, Cas. Eq. 3; Lindsley v. Diefendorf, 43 How. Pr. 357 (N. Y. 1872).

9 See §§ 10–14, *ante*.

1 Carpenter v. Thornton, 3 B. & Ald. 52, 106 Eng. Rep. 582 (1819).

on such a decree would lie where the decree involved, as the court regarded the case, the enforcement of a legal as distinguished from a purely equitable obligation.[2]

In the United States it was decided in New York as early as 1805 that an action of debt would lie on a New Jersey decree for money only.[3] That case has been followed generally in the other states. In a Pennsylvania case[4] the court followed the New York case, saying: "It is a general principle, that where a man is under an obligation to pay a certain sum of money, whether that obligation is founded on a contract, or the judgment of a court, an action of debt lies. On that principle we support actions of debt on foreign judgments. And I confess, I see no reason why a decree in chancery is not as strong as a foreign judgment." The Supreme Court of the United States in so holding, said: "We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter, received with regard to its dignity and conclusiveness as a record, would constitute the foundation for proceedings to enforce it, the former must be held as of equal authority. We lay it down, therefore, as the general rule that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other."[5]

2 Henley v. Soper, 8 B. & C. 16 (1828). Prof. Cook points out (15 Col. L. Rev. 238, 239) that the decree in that case (accounting between partners) involved no common law obligation in the absence of an account stated, and therefore the case allowed an action of debt on a decree in no essential way differing from the decree involved in the Thornton case.

3 Post v. Neafie, 3 Caines 22 (N. Y. 1805).

4 Evans v. Tatem, 9 S. & R. 252 (Pa. 1823).

5 Pennington v. Gibson, 16 How. (57 U. S.) 65 (1853). See additional cases to same effect cited by

Actions at law on decrees for money in the same state turn on the same principles and are decided in the same way.[6] Such cases are not numerous as usually there is no need for a judgment at law, but wherever the need exists in order that the obligation may be more effectually enforced, there is no difficulty in securing the judgment.

Decrees for relief of other kinds, not merely for the payment of money, may be enforced by action in equity in any other state in which personal jurisdiction over the defendant is secured provided the decree does not dispose of property in the state in which the later action is brought on principles differing from the laws of that state. Where the disposition of local property is not involved there seems to be no doubt but that an action on the foreign decree will be allowed in any other state. Thus where the defendant in an action for specific performance of a contract to convey land in Canada came to New York, avoiding performance of the decree of the Canadian court, an action in New York to compel him to execute a deed as required by the Canadian decree was allowed.[7] But where the decree directs the conveyance of land situated in another state, and thereafter an action is brought in that state to enforce the decree so made, is the court bound to recognize the decree under the "full faith and credit" clause of the Constitution of the United States? Admittedly the courts of each state have sole jurisdiction over land situated within the state. If in the above case, the court is bound to make a decree upon the decree of the foreign state without going back of that decree and inquiring into the merits of the case, the decree of the foreign state would be the real operating power, and it would operate to compel the transfer of title to land outside of the jurisdiction of the court making the decree, the court of the state where the land is situated merely rubber-stamping the decree without the right to review the litigation or to pass upon the questions of law and

Prof. Cook, 1 Cas. Eq., 329, note, a few of the many cases so holding.

6 Drakesly v. Roots, 2 Root 138 (Conn. 1794); Thrall v. Waller, 13 Vt. 231 (1841). These cases are reported 1 Cook Cas. Eq., 91, 92. See, also, Howard v. Howard, 15 Mass. 196 (1818); Cook, Powers or Courts of Equity (1915), 15 Col. L. Rev. 242, 243; Barbour, Extraterritorial Effect of the Equitable Decree (1919), 17 Mich. L. Rev. 527.

7 Roblin v. Long, 60 How. Pr. 200 (N. Y. 1880).

fact involved in the case. We may start with the rule, settled as a matter of law and principle alike, that no state can by its decree affect *in rem* the title to land situated in another state. The decree can have no operation *in rem* beyond the limits of the jurisdiction of the court, viz., the boundaries of the state.[8] But if the constitutional provision applies in these cases the result is that a foreign court will have power to dispose of land in another state by its decree, the action on such decree in the state where the land is situated becoming under such interpretation of the constitution a merely formal proceeding by which the foreign decree is in effect rubber-stamped as the decree of the state of the *situs*. This demonstrates that the constitutional provision does not apply.

Decrees in actions for specific performance of contracts to convey land in another state, and decrees ordering conveyance of such land by a trustee to a *cestui*, have been enforced by action on such decrees in the courts of the state where the land is situated, to such an extent that it must be regarded as the established rule. The practice of compelling a defendant to convey foreign land by decree in equity developed from the *in personam* operation of the decree. The defendant was personally in the power of the court, and if he executed a conveyance under the duress of actual or threatened contempt process, no question has ever been raised of the validity of the deed. Such conveyances have everywhere been recognized as valid.[9] If the de-

8 Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960 (1891); Watts v. Waddle, 31 U. S. (6 Pet.) 389 (1832), Cooley v. Scarlett, 38 Ill. 316 (1865); West Point Mining & Mfg. Co. v. Allen, 143 Ala. 547, 39 So. 351 (1905); Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); 1 Cook Cas. Eq. 298.

9 Penn v. Lord Baltimore, 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (1750); Massie v. Watts, 6 Cranch 148 (U. S. 1810); Sutphen v. Fowler, 9 Paige (N. Y.) 280 (1841). The validity of deeds so made is expressly recognized everywhere, including the cases hereafter cited on this general question. In Steele v. Bryant, 132 Ky. 569, 116 S. W. 755 (1909), a deed executed by legal compulsion of this kind, was sustained as valid. Similarly, a deed obtained in the same way conveying domestic land was sustained in Gilliland v. Inabnit, 92 Iowa 46 (1894). Under the old practice it was necessary to get personal jurisdiction of the defendant in such cases, as we have seen (see § 12 *ante*), hence the practical necessity of suing him in specific performance wherever he might be found. Today in nearly every state (see §§ 11 and 12, *ante*), the action may

fendant escapes from the jurisdiction of the court without obeying the decree, the courts of the *situs* treat that decree as settling finally the equitable rights of the parties, and enforce it by action thereon.[10] They do this, however, only in cases in which the law involved is the same in both states. It is, therefore, a matter of comity between states, not a matter of enforced recognition of the decree under constitutional mandate. This is brought out very clearly by Judge Baldwin in a Connecticut case [11] in which a decree of a South Carolina court was pressed for enforcement. That decree was made on the theory that a residuary clause disposing of the balance of the testator's property in one common mass worked an equitable conversion of the realty into personalty, including real property situated in Connecticut. The Connecticut court decided that no equitable conversion took place, and the decree of the South Carolina court in no way affected the land situated in Connecticut. Judge Baldwin said: "If the question were not one directly involving

be brought locally and the defendant served by publication, title passing by operation of the decree *in rem*, but the old practice of suing the defendant in the state where he is found, *in personam*, is probably too definitely settled to be disturbed, though in effect it means the practical disposition of local land by foreign decree.

[10] Burnley v. Stevenson, 24 Oh. St. 474 (1873), (the court recognizing and giving effect to a decree of specific performance of a contract to convey the same land made by a Kentucky court in the defendant's favor against the plaintiff who had the legal title, defendant having taken possession after securing the decree in the Kentucky action); Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067 (1896), (action sustained on a decree of an Ohio court ordering the conveyance of land in Michigan in the winding up in equity of a partnership); Fall v. Eastin, 215 U. S. 1 (1909), [Judge Holmes saying: "If the husband had made a contract, valid by the law of Washington, to do the same thing (viz., to convey land in Nebraska to his wife) I think there is no doubt that the contract would have been binding in Nebraska. . . . So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska."] See cases referred to or discussed in text and notes immediately following which recognize that a personal decree by a foreign court to convey in specific performance, fraud and trust cases will be enforced in courts of the *situs* by action on the decree. That decrees for the conveyance of foreign land in the winding up of a partnership will be similarly enforced is held in Dunlap v. Byers, *supra*, a decision which is generally approved.

[11] Clark's Appeal, 70 Conn. 195, 39 Atl. 155 (1898).

the modes of passing title to lands in this state, the rules of international comity might require us to accept the interpretation of the will." . . .

This theory of comity reconciles the cases, which on the surface seem hopelessly in conflict, though any reconciliation of the conflicting opinions of the judges and writers on this problem seems out of the question. Burnley v. Stevenson, referred to above, is expressly based upon the theory that the constitutional provision requiring that full faith and credit be accorded the judgment or decree of another state applies, the court saying: "When, therefore, a decree rendered by a court of a sister state, having jurisdiction of the parties and of the subject-matter, is offered as evidence, or pleaded as the foundation of a right in any action of the courts of this state, it is entitled to the same force and effect which it had in the state where it was pronounced. . . . That this decree had effect in Kentucky of determining the equities of the parties to the land in this state, we have already shown, hence the courts of this state must accord to it the same effect. . . . It must be regarded as conclusive of all the rights and equities which were settled therein, unless it be impeached for fraud." The decree for specific performance of a contract to convey the land in question rendered in favor of the defendant against the person from whom the plaintiff derived title was held to be a good equitable defense to the plaintiff's suit in ejectment, though the decree was made by a Kentucky court and the land was situated in Ohio.

In Fall v. Eastin [12] the Supreme Court sustained the Nebraska Supreme Court in their decision that the Nebraska courts were not bound by a decree of the Supreme Court, state of Washington, which granted the plaintiff a divorce from her husband and ordered him to convey to her the real property in question, situated in Nebraska, in a division of the separate property of the parties pursuant to the divorce laws of Washington. The defendant took title from the husband, but not as purchaser for value without notice. The Nebraska court based its decision not only on the lack of power of the Washington court to transfer any right or title to land in Nebraska, but principally on the

[12] 215 U. S. 1 (1909), *supra*, note 10.

fact that the laws of Nebraska had no provision for such a division of property in divorce cases. The court said: "Under the laws of this state, the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and, in such an action, have no power or jurisdiction to divide or apportion the real estate of the parties. . . . A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void." The prevailing opinion of the Supreme Court by Judge McKenna emphasizes the doctrine, which no one disputes, that a decree cannot operate *in rem* upon a *res* in another state. Only as the court questions the soundness of the decision in Burnley v. Stevenson, *supra,* is there any attention given to the question of whether the equitable rights of the plaintiff under the Washington decree must be recognized and enforced by the Nebraska court under the full faith and credit clause. The case decides, however, that the clause in question does not apply, but Judge Holmes, in a concurring opinion said: "If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. . . . So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else." He then concurs for the peculiar reason that the defendant was not the husband, and though not a purchaser for value without notice, the Nebraska court might have based its decision on a holding that any purchaser whether with notice or not, might hold free of the equities arising under the decree in the plaintiff's favor, and that such a decision would not be in violation of the constitution. It seems clear, however, that the Nebraska court decided that a disposition of Nebraska land contrary to Nebraska law could not be made by decree of the court of another state, either directly by *in rem* operation, or indirectly by action in Nebraska on the decree; that the "full faith and credit" clause had no application, because if it did apply it would violate the fundamental right of the state courts to determine the disposition of its lands. It necessarily follows that in specific perform-

ance, trust, partnership and other cases in which foreign decrees affecting local land are enforced by action, it is done on the principle of comity laid down by Judge Baldwin as quoted above, where the laws of both states are in accord on the subject-matter of the litigation.

That this is the true basis on which to place these cases is strongly supported by Matson v. Matson,[13] and Mallette v. Scheerer.[14] In each of these cases the same type of decree in a divorce action directing the conveyance of land in another state by the husband to the wife was involved. The only essential difference from Fall v. Eastin was that the law of the *situs* of the land in each case was the same, with reference to the division of the property in case of divorce, as was the law of the state where the decree was made. In each case the decree of the foreign court was recognized and enforced by action thereon in the court of the *situs,* the Fall case being distinguished principally on this ground. In Bullock v. Bullock,[15] the New Jersey Court refused to recognize and enforce by action a New York decree of divorce in which after ordering the payment of alimony the husband was directed to execute a mortgage on land belonging to him in New Jersey to secure its payment. Magie, J. squarely met and decided the real question involved in these cases, viz., whether the decree created an equitable obligation which the court in New Jersey was bound to enforce. After recognizing that the divorce was valid, and that the decree for alimony could be enforced in New Jersey as a debt, he denied that the direction to execute the mortgage bound the New Jersey courts saying: "It is a misuse of terms to call the burden thereby imposed upon respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. . . . It is scarcely necessary to observe that a court of New York could not be empowered to affect by its decree or judgment lands lying within

[13] 186 Iowa 607, 173 N. W. 127 (1919). In this case the court points out that in the Bullock case (note 15, *post*) as in the Fall case, the decree if made locally could not be enforced; that the New Jersey court said in effect that "if the courts in New Jersey could enforce such a decree they would not refuse like relief on an extraterritorial judgment."

[14] 164 Wis. 415, 160 N. W. 182 (1916).

[15] 52 N. J. Eq. 561, 30 Atl. 676 (1894).

another state. For no principle is more fundamental and thoroughly settled than that the local sovereignty by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents, and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty nor the judicial proceedings, decrees and judgments of its courts can in the least degree effect such lands and immovable property." He brushed aside the sophistry that the enforcement of the decree by action in New Jersey would be the enforcement of a personal obligation, and made very clear the fact that to enforce the decree without going into the merits would actually amount to a disposition of New Jersey real property by New York decree.

The law is settled in New Jersey as elsewhere that a decree directing the conveyance of foreign land *in personam* is valid, and that a conveyance made under such compulsion will be effective, and there is no real doubt but that a foreign decree to convey New Jersey land in a specific performance case or against a trustee would be recognized and enforced in New Jersey as a matter of comity.[16] But a disposition of New Jersey land by a New York decree in a divorce case involving the giving of security for alimony not in accord with the law and practice in New Jersey was repudiated, and the application of the "full faith and credit" clause was denied.

Professor Barbour, in a brilliant article on this question,[17]

16 Davis v. Headley, 22 N. J. Eq. 115 (1871). Decrees for money of another state are enforced by action in New Jersey as elsewhere. Bullock v. Bullock, 57 N. J. Law 508, 31 Atl. 1024 (1895). Decrees of another state directing the conveyance of land elsewhere than in New Jersey will be recognized and accepted as binding by the New Jersey courts. Bennett v. Piatt, 85 N. J. Eq. 436, 96 Atl. 482 (1915). In the Bullock case in 52 N. J. Equity, *supra*, the court admits that decrees *in personam* affecting foreign land in specific performance, trust and similar cases are valid, and that such decrees will be enforced as to New Jersey land when they are made under law similar to the law in New Jersey applying to the case. See note 13, *supra*, with reference to the interpretation of the Bullock case by the Iowa court in Matson v. Matson.

17 The Extra Territorial Effect of the Equitable Decree (1919), 17 Mich. L. Rev. 527.

Professor Barbour insists that land in any state is already at the mercy of decrees made in other states, since deeds executed because

argues with much logic and force that the "full faith and credit" clause of the constitution applies in these cases, and therefore the Fall case and the Bullock case are wrongly decided, his contention being that as the foreign court has admittedly jurisdiction of the parties *in personam,* and power to make the decree, and to compel the execution of a deed or mortgage by the defendant which would be valid everywhere, it follows that the decree determines the actual rights of the parties, and must be given effect under the constitution as stated in the quotation from Burnley v. Stevenson, *supra,* just as a decree for money, or a decree of any other kind must be recognized and enforced in any other state by force of the constitutional provision where disposition of land in such state is not involved. But the decrees we are discussing undoubtedly do involve actually the disposition of foreign land, if the constitutional provision applies. In that event the court of the *situs* must in effect rubber-stamp the decree without going into the law or facts back of it. It would have no discretion. The foreign decree would be final. Professor Barbour argues that policy and efficient enforcement of our laws as between the states requires this. But why should a foreign decree disposing of local real property have a greater force or effect than a foreign judgment at law in ejectment, which would be admittedly void? The matter will be settled finally when it is recognized that these actions in equity having for their object the transfer or settlement of title to land are actually *in rem,* as we have demonstrated in the foregoing sections treating of equity's powers *in rem*; that they are personal only as a matter of mere form. The *dictum* by Judge Holmes in the Fall case, and the statement in Burnley v. Stevenson, both quoted above, are obviously based on the view

of the compulsion of such decrees are everywhere valid; that giving effect to the decree by action would have no greater or other effect on the land than a deed so made. This is true. But the surrender of control over local land by courts of the *situs* by giving effect to such deeds, came about, as explained in the text above, because of the historical development of the jurisdiction of equity in these cases, acting *in personam* on the person of defendant, and it was necessary as a practical matter because courts of the *situs* could not originally act *in rem* in case the defendant left the state. There is no good reason why this should be extended so as to make such decrees operate practically *in rem* upon foreign land.

that these actions are really personal, which is true only as a matter of mere form. The law seems settled that the "full faith and credit" clause does not apply in these cases. Professor Barbour's argument finally gets down to this one point, and he makes the same mistake of taking mere form for the substance. Expediency demands that these decrees be enforced in the courts of the *situs,* and this is accomplished by giving effect to them as a matter of comity where the law involved is substantially the same in the two states.

Cases of strict foreclosure of mortgages on foreign land were decided in England on the theory that as equity acted on the defendant *in personam* by restraining him from enforcing his equity of redemption after the date for redeeming fixed by the decree, personal jurisdiction of the mortgagor was sufficient to allow the action, though the land was beyond the reach of the court.[18] The result is that in these cases the title of the mortgagor-defendant to foreign land is in effect wiped out if the decree is recognized and enforced in the state of the *situs.* The equitable title of the mortgagor is, in equity, ownership of the property; it is ownership at law as well under modern law in England and nearly all the states.[19] Such a decree undoubtedly would not be recognized or enforced by the courts of the *situs* anywhere today, as it is obvious that the action is really *in rem,* though *in personam* as a matter of mere form. Of course the court could compel the defendant to execute an instrument releasing or conveying his equity to the mortgagee, which would be valid and effective anywhere, but the mere decree would have no effect on the land by action in the courts of the *situs.*[20] Here the same principles are involved as in the cases above dis-

18 Toller v. Carteret, 2 Vern. 494, 23 Eng. Rep. 916 (1705); Paget v. Ede, L. R. 18 Eq. 118 (1874).

19 See § 24, *post.*

20 Lynde v. Columbus C. & I. C. R. Co., 57 Fed. 993 (1893). The court quotes from Story, Conflict of Laws (7th Ed.), § 539:—"In respect to immovable property, every attempt by any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem.*" The court then says: "These principles have been recognized and acted upon by all courts as having their foundation in reason, and as essential to the peace and security of independent states." To same effect, Farmers Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 334, 11 Atl. 184 (1887); Title Ins. & Trust Co. v. Cal. Development Co., 171 Cal. 173, 152 Pac. 542 (1915). See note, 29 Harv. L. Rev. 456.

cussed. The *in rem* character of the decree is, however, more obvious.

Foreclosure by sale, the universal American method, necessarily involves transfer of a complete title to the purchaser, and therefore the action is very definitely *in rem*. A sale under the decree passes title *in rem* to local land, that power being given expressly or impliedly by statutes providing in all the states for foreclosure actions. Actions in equity to enforce equitable liens where no statute exists were referred to in an earlier section as instances of equity's power to act *in rem* independent of statute.[21] Obviously equity will not make a decree for a sale of foreign land on foreclosure, though the power exists to compel the defendant to convey to the purchaser on such a sale if personal jurisdiction over him has been secured. It would be too obviously an interference with the exclusive jurisdiction of the courts of the *situs*. But where the mortgage covers a parcel of land situated on both sides of the line between two states, and a sale in a single parcel is required in order that its value may be secured, the court may order a sale of the entire parcel by the referee or other officer of the court, requiring the defendant to execute a deed conveying to the purchaser that part of the parcel situated in the adjoining state. The courts of the adjoining state, by weight of authority and principle, will recognize and enforce such a decree.[22] It should be obvious in these cases that the constitutional provision of "full faith and credit" does not apply, but that the decree is enforced by the courts of the *situs* on principles of comity. Foreclosure of mortgages on railroads extending through adjoining states are particularly important illustrations of the application of these principles.[23]

[21] See § 13, *ante*.

[22] Muller v. Dows, 94 U. S. 444 (1876); Mercantile Trust Co. v. Kanawha & O. R. Co., 39 Fed. 337 (1889); Farmers Loan & Trust Co. v. Postal Tel. Co., note 20, *supra*. In the latter case a sale by a referee under a N. Y. decree of foreclosure and the referee's deed purporting to convey defendant's property including land in Connecticut was held void as to the land in Connecticut, and therefore was not a defense to a foreclosure in Connecticut. If the New York decree had ordered a conveyance of the Connecticut land by the defendant to the purchaser, and an action had been brought in Connecticut to enforce that decree, it would, no doubt, have been sustained.

[23] See cases cited, notes 20, 22, *supra*.

It would seem to follow from the foregoing principles, that while decrees in interpleader cases are valid and binding wherever a domestic *res* is concerned,[24] they will not bind the courts of the *situs,* where the *res* is not within the jurisdiction of the court making the decree, unless personal jurisdiction is secured. This seems to be the real basis of the decision in Cross v. Armstrong,[25] though the court takes the view that the interpleader suit was necessarily *in personam,* and therefore the Pennsylvania court had no jurisdiction without personal service. The respective rights of the beneficiary and the personal representative to the amount due under an insurance policy was the dispute involved in the interpleader action, and the court's position seems reasonable that the administrator was not required to appear in the interpleader action in Pennsylvania to litigate a question of the application of an Ohio statute making a part of the money payable under an insurance policy applicable to the payment of the debts of the insured, the question arising between residents of Ohio under a policy subject to the Ohio statute. If we regard the right of action on the policy as property of the estate of the deceased in so far as it was subject to the payment of the debts of the insured, and as the property of the beneficiary as to the balance, its *locus* was Ohio, and a foreign decree disposing of its ownership contrary to the law of Ohio should not be recognized in that state. If the defendant had been personally served in Pennsylvania, and had litigated the issues in the interpleader suit, ownership of the chose would be necessarily settled by the interpleader action, and as the Pennsylvania court would have jurisdiction *in personam,* its decree would be *res adjudicata* between the parties. Jurisdiction *in personam* is sufficient in cases not involving the disposition of land, hence the difference between a case of the kind just referred to and the cases of trusts, specific performance and the like, discussed heretofore, in which land in another state is the subject-matter of the action.

§ 18. Decree Requiring Acts in Other States. The power of a court of equity having personal jurisdiction to compel the

24 See § 14, *ante.*

25 44 Oh. St. 613, 10 N. E. 160 (1887).

defendant to execute deeds, mortgages or other instruments affecting the title to land in other states appears sufficiently from the cases discussed in the preceding section. The court has the power to decree performance of acts beyond the jurisdiction of the court, and if the defendant is a corporation doing business within the state, or is an individual with a business or property within the state, the court will have the means to compel performance by sequestering such property, though the court cannot send its representatives into the adjoining state to compel compliance with the decree. Nevertheless equity ordinarily refuses, as a matter of expediency, to make such decrees, as it may have no adequate means of enforcing them.[1] This was particularly true during the period of strife between law and equity when equity was very cautious in making decrees which might be disobeyed with impunity.[2] The modern cases show a very decided tendency to grant such decrees when the protection of the property rights of the plaintiff within the state demand it. Thus where the wrongful act of the defendant is committed over the line in another state, resulting in wrong to property of the plaintiff within the state requiring specific relief, a decree will be made ordering the defendant to perform acts beyond the limits of the state.[3] It is purely a question of expediency, not

[1] Port Royal R. R. Co. v. Hammond, 58 Ga. 523 (1877) (the court refusing specific performance of a contract by defendant to keep ditches open and to construct and maintain cattle-guards along its right of way through complainant's land in South Carolina); Lindsley v. Union Silver Star Mining Co., 26 Wash. 301, 66 Pac. 382 (1901). (Demurrer to bill for injunction restraining trespass to mining property in another state sustained, as the action was in its essence local like the corresponding action of trespass to land at law); Northern Ind. R. R. Co. v. Mich. Cent. R. Co., 15 How. 233. The first two cases are reported, 1 Cook Cas. Eq. 306, 307.

[2] See § 5, *ante*.

[3] In Great Falls Mfg. Co. v. Worster, 23 N. H. 462 (1851), 1 Cook Cases Eq. 309, defendant was enjoined from interfering with the dam of the plaintiff which was situated partly in New Hampshire and partly in Maine, the wrongful acts committed or threatened affecting the part of the dam in Maine, with resulting damage to the plaintiff's property in both states. In the Salton Sea cases, 172 Fed. 792 (1909), an injunction was granted against a wrongful diversion of the Colorado river made in Mexico, compliance with the decree requiring acts by the defendant in Mexico. The diversion caused damage to plaintiff's property within the court's jurisdiction of a kind demanding relief in equity. The court admits

of jurisdiction in the sense of power, and there is surely no reason why the relief which justice demands should not be given, provided means exist by which the court may bring pressure to bear upon the defendant in case he fails to obey the decree.

§ 19. The Nature of Equitable Rights and Equitable Title. Two theories of the nature of equitable rights are urged by legal scholars. The older theory, drawn from the history of equity and the method of enforcement of decrees *in personam,* regards equitable rights as fundamentally personal rights enforceable only in equity against the owner of the legal right or title on which they depend and from which they are derived. This theory refuses to admit that there may be equitable rights *in rem,* or that any new right may be created by equity except as a derivative of a legal right for the more perfect enforcement of the legal right.[1]

Another and quite recent school of thought on this topic urges that all rights are divided into two classes, rights which are concurrently legal and equitable, recognized and enforced both at law and in equity, and rights which are purely equitable since they are recognized and enforced only in equity. A third class of legal rights which are in conflict with prevailing equi-

that no injunction will issue where the property injured is not within the jurisdiction, citing Northern Ind. R. Co. v. Mich. Cent. R. Co., 56 U. S. 233, and Miss. & Mo. R. Co. v. Ward, 67 U. S. 485. As in the New Hampshire case the court acted on its power over the defendant *in personam* to compel performance by contempt process or by sequestration, in order to protect the local property rights of the plaintiff as justice required. In Vineyard Land & Stock Co. v. Twin Falls &c. Co., 245 Fed. 9 (1917), the court not only granted such an injunction but ordered the installing of meters and inspection thereof by the plaintiff on defendant's land in Nevada which was beyond the territorial limits of the courts jurisdiction, in order to limit the amount of water taken. Another case involving the same kind of relief is Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11; same title, 218 U. S. 258 (1910).

[1] Ames, Lectures in Legal History, 443, 444; Ames, Purchaser for Value Without Notice (1887), 1 Harv. L. Rev. 1 at 9; Langdell, A Brief Survey of Equity Jurisdiction (1887), 1 Harv. L. Rev. 58; Langdell, Classification of Rights and Wrongs (1900), 13 Harv. L. Rev. 659 at 673; Langdell, Summary of Equity Pleading (2nd Ed.), 210, 211; Maitland, Equity 16–18; Maitland, *ibid.* Lectures IX, XII. See also Stone, Book Review (1912), 12 Col. L. Rev. 756.

table rights is treated by them as having no valid existence, pretended rights based on spurious law, since the opposing rule in equity is the prevailing law, and no state can have at the same time two rules of law which are in conflict with each other. It is insisted that real rights or rights *in rem* exist in equity as at law.[2]

These opposing theories may best be examined by applying them to the different classes of equitable rights in their relation to legal rights in a broad review of the equitable field of action.

I. Cases of legal rights enforced by specific relief in equity. Rights in contract and in tort at law are fully recognized and enforced in equity, and therefore in that sense such rights may be regarded as concurrently legal and equitable.[3] Equity, however, intervenes to protect such legal rights only where the remedy at law of damages is inadequate, and a better and more perfect remedy is found in specific relief in the form of specific

[2] Hohfeld, The Relations Between Equity and the Law (1913), 11 Mich. L. Rev. 537, 553, 555, 557; Hohfeld, Fundamental Legal Conceptions 131, 133, 136; 1 Cook, Cas. Eq. 121; Beale, Conflict of Laws 151, 152, Professor Beale saying: "It is submitted that the commonly received explanation of the distinction between law and equity in common-law jurisdictions is inaccurate It is true that in each of those jurisdictions the theory on which courts proceed is the theory of separate and independent systems of right. . . . It is clear, however, that there cannot be two separate and distinct laws prevailing in the same place at the same time; and therefore in fact, whatever may be the theory of the courts, one of the conflicting rights must be valid and the other invalid. It is submitted that the true explanation of the difficulty is that the equitable right is the prevailing one, that the legal right represents a prior condition of the law, before the unwritten law was changed by the acceptance on the part of the profession of the equitable doctrines as law." See also Cook, Alienability of Choses in Action (1917), 30 Harv. L. Rev. 449, Hohfeld, Fundamental Legal Conceptions (1917), 26 Yale L. J. 767, Huston, Enforcement of Equitable Decrees, 87–154; Billson, Equity in its Relations to Common Law.

[3] Professor Hohfeld says in his article cited above: "The Concurrence of Equity and Law. A jural relation may be concurrently legal and equitable—that is, one recognized and vindicated both by law courts and by equity courts. As regards every such case there is, of course, no conflict between equity and law." Professor Hohfeld says that in all cases where equity refuses to interfere because the remedy at law is adequate, equity, by refusing to act recognizes and adopts the legal rule which is therefore concurrently legal and equitable.

performance in contract cases and injunction preventing the threatened wrong in tort cases. In any specific case of this kind where equity has intervened and has decreed specific relief, any damages in addition thereto to which the plaintiff is entitled are given in equity, displacing and barring any further relief at law. But in no true sense can it be said that law and equity are in conflict in such cases. Relief in equity supplemented relief at law.

In cases in which equity will not intervene to protect legal rights because the remedy at law is adequate, it is, no doubt, correct to say that equity recognizes the legal right in refusing to interfere, but surely where no question of interference by equity is involved it is of no real help to treat such rights as concurrently legal and equitable. That equity recognizes and protects legal rights in contract, tort and other cases where the remedy at law is inadequate and where specific relief in equity may be given and enforced with advantage, seems to cover the matter. In other cases of legal rights equity would, no doubt, recognize such rights if there should be any occasion, but as no occasion therefor exists such possible recognition would seem to be immaterial.[4] Nothing is gained by emphasizing the obvious and always tacitly recognized fact that equity recognizes and enforces the law wherever there is occasion therefor in all cases where there is no conflict between law and equity. In this group of cases legal rights alone are protected and vindicated by forms of specific relief peculiar to equity. No primary equitable rights are involved. Equity gives specific relief which the law refuses. To call these rights concurrently equitable must not be permitted to obscure the historical and generally recognized distinction between legal and equitable rights.

II. Cases in which equity enforces rights not recognized at law, establishing law in conflict with legal rules. It must be taken as established that this conflict between rules at law and rules in equity has always existed since equity as administered by Chancery was established in the fifteenth century. In these

4 See Professor Hohfeld's article cited, *supra*, and article by Professor Cook in (1917) 30 Harv. L. Rev. 449, asserting that all legal rights not contrary to conflicting equitable rights are concurrently legal and equitable.

cases the rights vindicated are purely equitable as they are denied at law.[5]

Uses and trusts give us the most important, and at the same time the most distinctive, group falling within this class of cases. From the latter half of the fifteenth century the *cestui que use,* or beneficiary of a trust, has been recognized in equity as in substance and fact owner of the property, the trustee having the "legal title" for purposes of the use or trust, but with no beneficial or actual ownership in himself. The historical reasons for this situation are found in the development of uses for the purpose mainly of avoiding the rigors of the common law of land which forbad gifts of land by will and transfers *inter vivos* except by livery of seisin, transfer of possession, or its equivalent, and which still burdened military tenures with the burdens of wardship, marriage and other feudal incidents, the reasons for which were passing or had passed. This historical development has been discussed heretofore.[6]

The usual incidents of ownership have since the fifteenth century attached to the *cestui.* He may convey, devise, mortgage and lease his equitable estate. He has the right of possession, of collecting and enjoying the rents and profits as owner as against all the world. Even in cases of active uses and trusts where the trustee was or is required to manage the property and collect and pay over the income, no beneficial ownership exists in him as he is a mere fiduciary, required to account to the beneficiary for rents and profits and responsible as fiduciary for the property so held by him. Here as in cases of inactive uses or trusts all beneficial ownership is in the *cestui.* It is true that as a matter of mere form and procedure the use or trust has been enforced as a right *in personam* against the trustee. An appearance of harmony between law and equity was maintained in this way, and the recognition of the trustee by equity as legal owner was necessary to make effective this device by means of which the more burdensome feudal incidents and technical restrictions of the common law of land were avoided. We know that by the early part of the sixteenth century uses had become the prevailing method of land owner-

[5] See notes 2 and 3, *supra,* and § 5, *ante.*

[6] See § 4 (b), *ante.*

ship in England, and control over land ownership had to that extent, passed from the law courts to Chancery. The view of Langdell, Ames, Maitland and their followers that the *cestui* is owner only of a personal right of action, ignores the actual facts of ownership and recognizes only the form by which Chancery was able in such extensive measures to take over and control the law of land. That a conflict exists between law and equity as to the substantive ownership in these cases is clear. At law the trustee was owner. In equity, because the law failed to look beyond the legal title of the trustee, the right of the *cestui* as the real owner was recognized and enforced. Law and equity together, certainly since the settlement of the Coke-Ellesmere controversy, make up the law of the land, and in cases of conflict the rule in equity prevails. We know the prevailing law to be that the *cestui* is the actual owner with every right of ownership, with a kind of pretended ownership called the "legal title" in the trustee carrying no beneficial rights of ownership, the origin of which is explained by the historic needs of reform in the land law of the fifteenth century.[7]

[7] It is true that Chancery was very slow in giving full protection to the *cestui* as against the dower of the trustee's widow and as against the trustee's judgment creditors. The widow of the trustee took dower free of the use, and the trustee's lord took by escheat. Huston says (Enforcement of Equitable Decrees, 95): "The very case which enumerated these (heirs and donees of the trustee not purchasers for value without notice) as bound by the use distinguished the widow of the feoffee, who was agreed by the judges to take her dower right to her own use on the ground that she did not take through her husband's act or claim by him. The same rule governed the case of a lord taking by escheat," citing Mich. T. Y. B. 14 Henry VIII 4 (1522). In 1631, Nash v. Preston, Cro. Cas. 190, 191, 79 Eng. Rep. 767, the same position was taken as to dower in the trustee's widow, but in 1678 this case was overruled in Noel v. Jevon, 2 Freeman, 43, 22 Eng. Rep. 1047, and the rule was finally established that equity would bar dower in the widow of the trustee. Huston, *ibid.* 97, 98. The old rule by which the *cestui* was not protected against judgment creditors of the trustee was finally changed by Morley v. Martin (1673), Finch 63. The delay in these instances was probably due to the break in the development of equitable estates caused by the Statute of Uses. Subject to these defects equity enforced the *cestui's* ownership prior to the Statute of Uses. The history of the complete rounding out in equity of the *cestui's* equitable estate is admirably given by Huston, Enforcement of Equitable Decrees, 87–154. For a valuable discussion of the nature of the *cestui's* rights see Scott, The Nature of the Rights of the *Cestui*

Professor Maitland recognizes much of this, but he regards as conclusive of the trustee's sole ownership *in rem* the fact that the trustee can convey a perfect title, free of the trust, to a purchaser for value without notice.[8] That doctrine was created by equity as a limitation upon equitable ownership in the latter part of the fifteenth century, in connection with and as part of the process of creating uses as estates in land. Having made the legal title of the trustee an empty thing of mere form so far as beneficial ownership was involved in order that the purposes of uses could be accomplished, it seemed wise and just from the standpoint of the public interest, that a purchase for value from the trustee, without notice of the trust, should be protected against the equitable owner. This gave to the trustee a power to convey to such a purchaser, but a power without right, since its exercise would involve a breach of trust for which he would be liable to the *cestui*. To this extent it may fairly be said that the ownership of the *cestui* was not complete, as it was subject to defeat by the exercise of this power in the trustee. But surely this is no reason or excuse for the view that in fact and reality the *cestui* is not owner of the property *in rem*. At law we have the same principle involved in England in cases of sales of chattels in market overt, title passing to a purchaser for value without notice though the vendor had no title.[9] Under factors' acts in most jurisdictions a sale by a factor transfers title to a purchaser for value without notice though he sold in violation of instructions of the consignor so that no title would have passed to such purchaser except for the statute.[10] The recording acts in the United States illustrate the same principle based on public policy. An unrecorded deed is made void as against a later deed from the same grantor if such later deed was made to a purchaser for value without notice and was recorded before the first deed.[11] No one questions in these cases the ownership of the man deprived of his title by conveyance to the innocent purchaser. Because of public policy his ownership

Que Trust (1917), 17 Col. L. Rev. 269, and in reply thereto, Stone, The Nature of the Rights of the *Cestui Que Trust*, *ibid.* 467.

8 Maitland, Equity. 119–121. See § 4 (b), *ante*.

9 Case of Market Overt, 5 Co. 83b (1595). Huston, *ibid.* 124.

10 Williston, Sales, §§ 318–322.

11 See Walsh, Property (2nd Ed.) 767.

is subject to defeat in these cases, but that he is owner *in rem* prior to such defeat there can be no doubt.[12]

[12] Huston, *ibid.* 125; Cook, The Alienability of Choses in Action (1917), 30 Harv. L. Rev. 449, 479. See discussion of these statutes in relation to the equitable doctrine in Maitland, Equity, 142. See Ames, Lectures on Legal History, 142; Ames, Purchaser for Value Without Notice (1887), 1 Harv. L. Rev. 1, for the theory that the purchaser for value without notice is protected against prior equities because it is fair and just that he keep what he has got; that it would be dishonest for him to do so if he took with notice or paid nothing of value, as he would hold just as the trustee held, subject to the equity. As purchaser for value without notice, therefore, he is not bound by the personal obligation of the trustee to the *cestui*. Professor Huston demonstrates that the justice and fairness of the purchaser's position ethically is not the basis of this doctrine. By the great weight of authority the doctrine does not apply to an equitable interest transferred to such innocent purchaser for value. Prior equities are not cut off in that case. Huston, *ibid.* 118–120, and cases there discussed.

Equities take effect in the order of their priority as rights *in rem*, unaffected by a transfer of a later equity to an innocent purchaser for value. The ethical position of such purchaser is equal in all respects to such purchaser of a *legal* title. That this ethical theory is not the basis of the doctrine is further shown by the fact that the doctrine does not apply to a purchaser who has signed a contract and paid the price. He must get the legal title by actual conveyance before the doctrine applies, though his ethical position, as a matter of fairness and right, is as good in one case as in the other. See Huston, *ibid.* 122, 123. These cases of trusts stand by themselves, as the device of a legal title in another as trustee without beneficial ownership was essential to the purpose of uses and trusts, as explained *ante*, § 4 (b). Equity recognized the trustee as legal owner that the real or beneficial ownership of the *cestui* might be left to equity free from the burdens and technicalities of legal ownership that it was the purpose of uses to avoid. Therefore equity recognizes the formal legal ownership of the trustee acting under equity's control, in cases of recovery of the land from a disseisor, and of trespass against a trespasser. The *cestui* may sue the wrongdoer in equity only after the trustee has refused or failed, after demand, to bring the appropriate legal action against the wrongdoer. The action at law can be brought only by the trustee. Merger of law and equity under codes does not destroy the trustee's title, because it is an essential part of the trust scheme created and developed in equity. This has been urged by Maitland and others as proof that such merger is procedural only, without effect on substantive law except in a few special cases. See Maitland, Equity, 156, *et seq.* In other cases of conflict, generally speaking, the result is to establish the rule in equity and to eliminate altogether the conflicting legal rule as part of the unified system of law established by the merger. See Chapter IV, post.

Mortgages present another clear case of conflict between law and equity. In the early cases in which equity intervened to prevent forfeiture, where the mortgagor by accident or mistake failed to pay the mortgage debt on the law day, there is no doubt that at law the mortgagee's title became absolute, and as the mortgage debt had not been paid, he could recover the debt in a personal action and keep the mortgaged land as well. In equity he was compelled to reconvey the mortgaged land on tender by the mortgagor of the amount due with interest from the date of default.[13] Equity regarded the mortgagor as, in substance and fact, the owner of the mortgaged property after default, subject to the holding of the technical "legal title" by the mortgagee solely for the purpose of securing repayment of his loan. Equity gave effect to the real nature of the transaction as the parties actually intended. The law enforced the mortgage deed literally as a defeasible conveyance to the mortgagee. Here as in the other cases of conflict the rule in equity has been the law, the conflicting rule at law having no true existence except as spurious law from the time equity first intervened in these cases. The right of the mortgagor is his so-called equity of redemption, enforced in form in equity by an action *in personam* against the mortgagee. But in equity his rights as the real owner, subject to the mortgage as security, were established and enforced in every respect, subject to the same doctrine that a conveyance of the legal title by the mortgagee to a purchaser for value without notice cuts off and destroys his equitable estate. What was said with reference to that doctrine applicable

Professor Huston's conclusion is that equity protected the legal title in the innocent purchaser for value from the trustee because equity had created the trustee as legal owner without benefits of ownership, and in the interests of sound public policy a purchaser for value relying on his apparent ownership in good faith should be protected in his purchase. This brings the doctrine into line with the similar doctrines of sale in market overt, under factor's acts, and conveyances void because not recorded under recording acts. The principle is "one which runs through the whole fabric of modern law:—an effort to ensure security in commercial transactions and acquisitions by imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it." Huston, *ibid.* 127, 128.

13 See § 5, note 19, *ante*, as to historical development of the mortgagor's equity.

to trusts may be repeated with even greater force with reference to mortgagors as owners *in rem* of their mortgaged land.

The modern "lien" theory of mortgages which developed at law in New York and many other states long before the Code, resulted from the adopting at law in those states of the equity view of mortgages, displacing and effacing the conflicting legal doctrine, which had become so completely contrary to the average understanding and experience, and to the real law of mortgages as administered in equity, that its elimination was demanded as a matter of reason and common sense. The result has been that in the great majority of the states the mortgagor, not the mortgagee, is now at law the owner of the mortgaged property, while the mortgagee owns the debt and the mortgage securing it as a chose in action. Here the adopting at law of the equity view has resulted in important changes of positive law, apart from the elimination of the conflicting legal doctrine. It changes the application of the doctrine of innocent purchaser for value above referred to. Where the "lien" theory prevails the mortgagor is legal owner, so that he may convey the legal title to an innocent purchaser for value free of prior equities, while in England and the so-called common law states he has only an "equity of redemption" which he may convey, but subject to prior equities, as the legal title does not pass. On the other hand the mortgagee in lien states, having only a chose in action, can assign it only subject to prior equities, offsets and counterclaims except where the mortgage is security for a negotiable instrument.[14]

In cases of fraud, accident, mistake and other so-called equitable defenses, jurisdiction in equity involves in each instance an obvious conflict between law and equity, the rule in equity prevailing as the only true law because of equity's control over the enforcement of the opposing legal right by enjoining the parties from prosecuting the action at law and by compelling them to surrender instruments for cancellation, to correct mutual errors therein, and to do any other act which justice demands in order that the conflicting rule at law may be barred from any actual operation.[15] Under the codes merging law and equity the equitable rule completely displaces the conflicting

[14] See § 24, *post.*

[15] See § 5, *ante,* also § 21, *post.*

legal rule.[16] Under statutes in non-code states which provide for the pleading of equitable defenses in law actions the law court applies and enforces the equitable defense, amounting to the same thing in practical result.[17] Therefore a specialty void in equity for fraud, is in effect void at law as well in such cases. An instrument subject to reformation in equity for mutual mistake is really enforceable only in its corrected form. The rule at law to the contrary is not in reality law at all, but rather that which formerly was law before being overcome by the later and correcting doctrine of equity.

In many of these cases, and cases of resulting and constructive trusts created by equity as remedial fictions to work out justice where relief at law was totally absent or defective, as well as in cases of rights of contribution in equity, the law has adopted the equity view as its own, or has given substantially the same relief in other forms. Proof by secondary evidence of a specialty or negotiable instrument lost or destroyed is an illustration.[18] Illegality was made a defense at law to a specialty or negotiable instrument by a case decided in 1767.[19] In many of the cases of implied trusts, in which the element of unjust enrichment existed, relief was subsequently given at law in the form of implied assumpsit, the law implying the promise for the sake of the remedy. The same form of relief was given at law in cases of contribution between cosureties and copartners. In all these cases law and equity were and are concurrent. The equitable doctrine became a legal doctrine as well, with some differences in the form of the remedy, but the former conflicting legal doctrine of no relief was necessarily extinguished.

Are equitable defenses or doctrines changed in their characteristics by being adopted by the law? Have they become legal in the sense that they cease to be subject to the doctrine of in-

16 See preceding note, also § 5, *ante*.

17 See § 21, *post*.

18 Underwood v. Staney, 1 Cas. Ch. 77, 22 Eng. Rep. 703 (1666); Kelley v. Riggs, 2 Root 126 (Conn. 1794), Reed v. Brookman, 3 T. R. 151, 100 Eng. Rep. 504 (1789), is probably the first case in which a law court adopted the equity view in this matter. See Ames, Specialty Contracts and Equitable Defenses, Lectures on Legal Hist. 104; 1 Cook, Cas. Eq. 129. As to negotiable paper see Davies v. Dodd, 4 Price 176, 146 Eng. Rep. 431 (1817).

19 Collins v. Blantern, 2 Wils. 341, 95 Eng. Rep. 847, Sm. L. Cas. 154 (1765).

nocent purchaser for value? In implied assumpsit or quasi-contract cases above referred to no change takes place in the application of the doctrine of innocent purchaser for value. These rights are enforced at law, exactly as in equity, subject to prior equities and a subsequent purchaser who would not be charged as trustee in equity will not be held liable in quasi-contract at law.[20] The question is raised directly in cases of assignments of non-negotiable choses in action. At law such assignments were void, at first probably because of the notion that they would violate a strictly personal relation between the original parties, the developing weakness of this notion being later reinforced by the laws against champerty and maintenance.[21] Equity early recognized the necessity of giving effect to such assignments and enforced them by its *in personam* procedure against the assignor in favor of the assignee. But the assignee's right was an equity only, and therefore subject to all defenses or offsets, legal or equitable, enforceable against the assignor at the time of the assignment or arising against him in favor of the debtor thereafter before notice to the debtor of the assignment.[22] Later the law modified its original position against assignments by adopting from the law merchant the doctrine of the assignability of negotiable instruments free of such offsets and defenses to an innocent purchaser for value.[23] Still later it worked out a scheme of assignments of non-negotiable choses in action by using the fictional doctrine that the assignee was an attorney or agent to collect in behalf of the assignor, requiring him to sue in the assignor's name, though the recovery was his absolutely. The ownership of the chose in action was in substance and reality in him, though by the fiction above referred to, as a matter of form, it was treated as still

20 See Chapter XX, § 106, as to fraud and Chapter XXI as to mistake, and the application of the doctrine of purchaser for value to these cases at law.

21 Ames, Disseisin of Chattels, Select Essays in Anglo-Am. Legal Hist. 580, 581; Beale, Conflict of Laws, § 152; Holdsworth, History of the Treatment of Choses in Action at Common Law (1920), 33 Harv. L. Rev. 997, 1002, 1003; Walsh, Hist. of Eng. and Am. Law, 338, 339.

22 Barbour, History of Contract in Early English Equity, 4 Oxford Studies in Legal History 108, (Assignments enforced in equity in the 15th century); Cook, Alienability of Choses in Action (1916), 29 Harv. L. Rev. 821 and note.

23 Walsh, Hist. &c. 445–449.

the chose of the assignor.[24] Modern developments by statute or decision have eliminated the use of the assignor's name, the assignee now suing in his own name. Today, therefore, he is owner of the chose both at law and in equity, and his right is concurrently legal and equitable. But this development has not changed the rule that the assignment is subject to defenses and offsets though the assignee be an innocent purchaser for value. The adopting of the rule in equity by the law courts does not change it. The assignment is subject to offsets and defenses at law as in equity.[25] Where the doctrine of estoppel has been carried into the law by the cases, it is applied exactly as in equity[26] and this must also be true when that doctrine is so carried in by code or other statutes.

The equitable defenses of fraud, mistake, and the like, now available at law as in equity, are not changed because they have become part of the merged system of law under the Code, or because statutes in code or other states provide that they may be set up as defenses to law actions. They are simply made more readily available. They do not become "legal" rights and cease to be "equities" for the purpose of the rule that "equities" only, not "legal" rights, are cut off by transfer of the legal title to an innocent purchaser for value. No change is made in the application of that rule, all of these former "equities" being subject to defeat by conveyance of the legal title to the property involved to such innocent purchaser exactly as before the change made by code or other statute.[27]

[24] See *supra* note 21, and *post* note 25.

[25] See Cook, Assignment of Choses in Action (1917), 29 Harv. L. Rev. 816 and Alienability of Choses in Action (1917), 30 Harv. L. Rev. 449; also Williston, Is the Right of an Assignee of a Chose in Action Legal or Equitable? (1916), 30 Harv. L. Rev. 97; Williston, The Word Equitable and Its Application to Choses in Action (1918), 31 Harv. L. Rev. 822, in which Professor Cook's discussion is reviewed. The nature of the assignee's interest at law and in equity, and the proper terms to apply to such interest, concurrently legal and equitable, or equitable as distinguished from legal, together with the application of the doctrine of innocent purchaser for value to the situation, are the more important matters debated in these articles.

[26] See cases cited Hinton, Equitable Defenses under Modern Codes (1920), 18 Mich. L. Rev. 717 at 721.

[27] As an illustration see Falk v. Hoffman, 233 N. Y. 199, 135, N. E. 243 (1922), specific recovery of stock sold to defendant through his

There is no good reason, therefore, to call them legal defenses. They are equitable defenses brought in with the rest of substantive equity in its merger with the law by the Code or merged only *pro tanto* under the special statutes in other states, and in principle there can be no doubt that these defenses may be tried to the court without submission to the jury when raised in law actions.[28] When we speak of the assignee of a chose as a legal owner, we mean that he is the real or substantial owner. What we do is to give effect to his right at law as in equity, subject to the same limitations. Possibly it would be more exact and lead to less misunderstanding to treat the assignee as having

fraud could not be had because of transfer to a presumably innocent purchaser. In cases of sales induced by fraud the vendor may recover at law in trover or replevin, enforcing rescission at law but not against a subsequent innocent purchaser for value. See 3 Williston, Contracts, 2443, 2444, 3 Cook Cas. Eq. 6–13. See Chapter XX, *post*.

28 See Cook, Equitable Defenses (1922), 32 Yale L. J. 645; Hinton, Equitable Defenses under Modern Codes (1918), 18 Mich. L. Rev. 717. Professor Hinton said: "An Equitable defense to a legal right of action involves a contradiction in terms. Either the equity is no defense at all, or it has become a legal defense." Professor Cook says referring to this statement:—"Argument of this kind seems to be based partly on the idea that under the code we still have 'courts of law' and 'courts of equity' and partly on the idea that if made a 'defense' in form the facts if disputed would necessarily be tried by the jury, instead of, as formerly in equity, by the court. . . . It (the idea of separate courts of law and equity) is, however obviously untrue . . . Equally unsound is the idea that if matter which formerly formed the basis of a defensive equitable proceeding is allowed as a defense *in form*, the mode of trial will necessarily be altered from court to jury. . . . Since the appeal is to the equity powers of the court, the fact that the form of the defense is changed should not alter the mode of trial, which should still be to the court and not to the jury," quoting Conn. Pr. Book (1922), 282 as so providing.

If "equities" set up as defenses under statutes are not changed into legal defenses, and it is clear they are not though they become good at law, it would seem that the equitable right of an assignee, at last enforced at law without the compulsion of statute, should still be termed "equitable." As issues of fact in these cases were, of course, tried by jury at law long before the era of our constitutions, the right to jury trial in such cases, no doubt, would be enforced. That they have become concurrently legal rights, even to that extent, does not make them any the less equitable as distinguished from legal under the nomenclature in general use. On the practical effects of codes and statutes in these and other cases, see Chapter IV, *post*.

an equitable right which is now merged with the law as part of the merged system, but no less equitable than equitable defenses or any other class of purely equitable rights brought into the merged law by the union of law and equity into a single system, or by partial merger under special statutes. To be sure true legal rights are also equitable in the sense that equity recognizes and enforces them, but "equities" and "equitable defenses" and "equitable rights" and "equitable titles" are terms in universal use as indicating distinctively equitable rights in their origin and history, not originally recognized at law. Though they become concurrently legal rights by adoption, they are not changed in the process. The change effected is the elimination of the conflicting legal rights, displaced by such equitable rights, whether that displacement be accomplished by decision, code or special statute. The exceptional situation created by the "lien" theory of mortgages is discussed above.

We may summarize by saying that all true legal rights are concurrent in equity, wherever such concurrence is material, and all equitable rights which conflict with opposing legal rights, when carried into the law become concurrent at law, displacing the former conflicting rule at law. Just as legal rights remain "legal" though concurrent in equity, so equitable rights remain "equitable," under nomenclature in general use, though they become concurrent at law.

From what has been said it is clear that equitable rights *in rem* exist in many cases, particularly in the right of a *cestui* of a use or trust and in the right of a mortgagor in states where the "lien" theory is not accepted. The vendor-purchaser relation arising under a contract for the sale of land enforceable by specific performance gives to the purchaser in very considerable degree the rights, powers, privileges and immunities of ownership.[29] In all cases of implied trusts, whether they be called resulting or constructive, though the purpose of the trust is solely to give a remedy, insofar as equity gives effect to rights *in rem* in the beneficiary, they must be recognized as such. Restrictive covenants enforceable by injunction in equity for the benefit of dominent estates are now definitely recognized under the prevailing law as equitable easements whether they amount to

29 See Chapter XVII, *post*.

legal easements or not. They are rights *in rem,* enforceable against all the world except an innocent purchaser for value of the servient estate. One getting title to the servient estate by adverse possession takes subject to such easement because he is not such a purchaser.[30] The doctrine that all such rights are *in personam,* not *in rem,* because enforced by *in personam* procedure in equity is exploded by this holding. No personal right, through the person of the legal owner of the servient estate, can possibly be enforced against the adverse possessor, since he holds by an independent title. The right of the dominent owner is necessarily *in rem,* though equity protects him by *in personam* procedure and form of relief. It does no good and much harm to deny that the equitable rights involved in the above classes of cases are *in rem.* Reason and positive law are to the contrary.

30 In re Nisbet & Pott's Contract, 1 Ch. 386, 391 (1906), Huston, Enforcement of Equitable Decrees, 110, 143. See Chapter XVIII, Equitable Easements and Restrictions.

CHAPTER IV

MERGER OF LAW AND EQUITY UNDER CODES AND OTHER STATUTES

§ 20. **Purpose, Character and Extent of Merger.** The history of the merger of law and equity, first in New York under the Old Code, and later in twenty-nine other states and territories in which codes similar to the New York Code were adopted, and in England by the Judicature Acts, which took effect in 1875, has been covered in Chapter II. The object of this chapter is, 1st, to examine the purpose of these statutes, and 2nd, to investigate how far that purpose has been given effect or defeated under the cases. This chapter will also treat of statutory changes in non-code states by which a very considerable degree of merger of law and equity has been accomplished in practical effect. These changes are so radical and so universal that the true approach to modern substantive equity must be made from the standpoint of the resulting system of law, combining law and equity as they existed theretofore, brought into existence by these codes and statutes. Undue emphasis upon the old equity, approaching the subject from the technical common law point of view, either ignoring or treating superficially these important developments in modern equity, has characterized much of modern writing and teaching on this subject. The purpose is to find out what the codes and statutes have accomplished in the merger of law and equity, in order that in the remaining chapters of this work the substantive rules of equity may be outlined primarily from the standpoint of that accomplishment.

The purpose of the codes in the many states adopting them, as well as of the Judicature Acts in England, was to end the scandal of two competing systems of law, each distinct from the other, in the same state. A single court of law and equity combined takes the place of the former independent and separate courts of law and equity. The practical absurdity and loss

under the former system involved in the necessity of maintaining an action in equity in order to establish a defense to an action at law by enjoining the defendant from prosecuting his action at law, or to restrain him from seeking relief at law when reason and conscience demanded the more adequate relief which equity might give, is brought to an end by making every action both legal and equitable so that every question, legal and equitable arising in any controversy between the parties, may be settled finally in a single action. The scandal of two conflicting rules covering the same matter in the same state is ended by establishing the rule in equity as the law, eliminating the conflicting legal rule, which, as we have seen, was never true law in the last analysis, as the opposing rule in equity always prevailed through the power of equity *in personam* over the parties.[1] These purposes were actually accomplished under the codes and the Judicature Acts. It is clear that these changes involved much more than changes of form and procedure. They involved the bringing of law and equity together into a single system of law, the content of which is the substantive rules of law and equity combined, with any rules of law in conflict with rules in equity eliminated to the extent of any such conflict. This means an actual merger of substantive law and equity, as though it had developed as a single system of law in a single court from the beginning, though the technical legal title of trustees and the equitable title of beneficiaries continue as before for reasons already explained.[2] Decisions which refuse to give effect to the provisions of the codes are reactionary attempts to avoid the full measure of reform actually accomplished, generally based on a false or defective understanding of the purposes and results of the statutes.

Rules of law are not changed by being brought in as part of a single system with equity except in the elimination of the rules in conflict with prevailing rules in equity. The elimination of this spurious law is the only substantive change. Rules in equity are not changed by being brought into a single system with the law. They continue as before with all their incidents including the doctrine of purchaser for value without notice, as explained and illustrated in the preceding section dealing with the nature

[1] See § 19, *ante*.

[2] See §§ 4 (b) and 19, *ante*.

of equitable rights. The history of law and equity and the terminology developed by centuries of usage demand that equitable rights and titles still be called such, though merged with legal rights. No one suggests that legal rights be called "equitable" merely because they have been merged with equity. They are still convenient terms to characterize and distinguish these classes of rights on the basis of their origin. The actual operation of these principles in some of the more important classes of cases will now be considered.[3]

[3] The failure of judges to grasp the real purpose and accomplishment of bringing law and equity together in one system, not to change substantive rules of law except in cases of real conflict, is illustrated by the language of Judge Selden in Reubens v. Joel, 13 N. Y. 488, 491 (1856), 1 Cook Cas. Eq. 168:—"By what process can these two modes of relief (viz., legal and equitable) be made identical. It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. . . . It is plain that the only way in which the declaration contained in section 69, that 'there shall be in this state hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs' can be made good, is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of actions. When this is done, and not till then, shall we have one homogeneous form of action for all cases. . . . It is, in my judgment, clear that the Legislature has not the constitutional power to reduce all actions to homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with article 1, section 2, which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or, by abolishing trial by the court, with its appropriate incident, specific relief, which would destroy all equity jurisdiction."

It is obvious that none of these results are involved. Law and equity are simply brought together into a single system. The former actions, modes of trial and forms of relief are simply brought together. What was equitable continues to be equitable, and what was legal continues as before. But all forms of relief may be had under the Code in a single action, settling every controversy between the parties, whether legal or equitable. Constitutional trial by jury makes necessary, as a practical matter, trial terms where "legal" causes formerly tried by jury may be tried, and this serves to keep alive the old distinction between actions in "equity" and "at law." But under the Code every action is both at law and in equity, whether at Trial Term or Special Term, in that every question, legal and equitable, at issue between the parties, may be settled in that suit without the need of any further

§ 21. Equitable Defenses. This term is used to designate defenses to causes of action at law established before merger under codes or other statutes by an affirmative action in equity to enjoin the defendant from prosecuting his action at law and to compel him to surrender instruments for cancellation, to satisfy any judgment recovered in the action at law, or to perform any other act designed to prevent enforcement of his legal action, when in reason and conscience that action should not be enforced. The conflict between law and equity was most acute in these cases and the final settlement of the question in favor of equity in the Coke-Ellesmere controversy involved a suit in equity of this kind as we have seen.[1] In form they are necessarily

suit on the other side of the court. The cases discussed hereafter abundantly establish this.

[1] See § 4, note 36, and § 5, notes 9 and 10, *ante*.

The more important so-called "equitable defenses" may be listed as follows:

1. *Defenses to specialty contracts.* Enforced in equity by affirmative action to surrender and cancel the instrument, with injunction against enforcing it by action at law. Equity acted because the law refused to act. At law anything outside the instrument was excluded, "for the specialty is the contract in itself." Bellewe (Ed. 1569), III, 8 Rich. II; Ames, Lectures Legal Hist. 104.

a. Fraud. At law fraud was a good defense to the enforcement of contractual obligations not specialties and fraud in the execution of sealed instruments, such as by substitution, fraudulent reading to an illiterate maker, or the like, vitiated the instrument when established under the plea, *non est factum.* But fraud in inducing the making of the instrument could not be proved at law, and therefore equity acted because the law refused to act. See cases cited by Ames, Specialty Contracts and Equitable Defenses, Lectures Legal Hist., 106, notes 1–4, establishing that this continued true until by the statutes and codes herein discussed this defense could be set up in law actions. For an account of the development of remedies for fraud at law and in equity see Ch. XX, *post.*

b. Illegality. A good defense at law only when it appeared on the face of the specialty or negotiable instrument. The law courts adopted the equity rule in 1767, Collins v. Blantern, 2 Wils. 341; thereafter illegality defeated the instrument both at law and in equity without the aid of statutes. Ames, *ibid.* 108.

c. Failure of Consideration. Equity intervened, as in the other cases, because the law did not allow the defense. There was no change until the codes and statutes permitting equitable defenses were enacted. Ames, *Ibid.* 108, American cases cited, note 1, 109.

d. Payment. If the instrument

affirmative actions, but their purpose is primarily to establish a defense to the action at law. There is not the slightest doubt that one of the outstanding purposes of merging courts of law and equity into a single court, and of establishing a single "civil action" in which all questions, legal and equitable, arising between the parties would be settled, was to do away with this preposterous practice of maintaining an additional suit in equity in order to establish a defense to the action at law. It is obvious that no additional statute specifically providing that such defenses may be set up as such in law actions was necessary. The Code, with its provisions for merger of law and equity, to the end that all questions, legal and equitable, arising between the parties, may be finally settled in a single action, necessarily ac-

was not surrendered and canceled, or no release was taken, on payment of the amount due, it could be enforced again at law. Equity intervened as in the other cases. Ames, *ibid.* 110, notes 3 and 4. The statute, 4 and 5 Anne, Ch. 16, § 11, made payment a defense at law in 1707.

e. Accord and Satisfaction. Good at law as a defense to an action for damages either in tort or in contract, including damages for breach of contract under seal, but not good if the specialty created a debt. A release under seal was necessary in such cases. A settlement in that case, however, was enforced in equity, and therefore may be set up as an equitable defense under the codes and statutes. Ames, *ibid.* 110, 111.

f. Duress. Though this defense has essentially the same basis as fraud, it has been a valid defense at common law since the thirteenth century. Though not an "equity" or "equitable defense," it is personal so that it cannot be set up against a subsequent innocent purchaser for value of a negotiable instrument. See Ames, *ibid.* 113, 114.

2. Mistake. Equity intervenes to correct mistakes in specialty contracts, deeds, and other instruments, so that the true intent of the parties may be given effect. The action in equity may be *(a) to reform the instrument,* in which case by modern practice in most states no actual redrafting or reexecution of the reformed instrument takes place; the decree operates to accomplish the reforming, and the instrument is enforced as reformed, but as of the date of its original execution. See §§ 111, 112, *post.* *(b) To rescind the contract,* whether in writing or not. See §§ 111, 112, 114, *post.* If mistake is set up as a defense to a law action, no affirmative relief being required, it need not be pleaded as a counterclaim; if affirmative relief on the reformed instrument is demanded, it must be so pleaded. See *infra,* note 6.

3. Trusts, express or implied, estoppel, subrogative and other equitable rights which defeat the rights of the plaintiff in an ejectment suit. See *infra,* notes 10–17.

4. Equitable mortgages. See § 24, notes 30–33, *post.*

complishes that result.[2] Nevertheless to remove any question the New York Code was amended in 1852 providing that the defendant may "set forth by answer as many defenses and counterclaims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both.[3] Many of the codes in other states have a similar provision, following New York in this respect. But whether such provision exists or not in any code state, it is obvious that a settlement of the controversy in a single action necessarily involves the trial of such issues as defenses where no affirmative relief is sought by the defendant, or as counterclaims where affirmative relief is sought by him. In Missouri, a code state, the defense to a tort action was a release, and the plaintiff replied that the release was obtained by fraud. The court held that an affirmative action to set aside the release for fraud was required, either by affirmative action in equity or by way of equitable relief in the law action, by amending the plaintiff's original pleading.[4] Other cases have taken the same view, ignoring the obvious fact that in actions to cancel specialties for fraud and to enjoin their enforcement the affirmative character of the action is mere form, that cancellation in equity of the instrument has as its sole object to make good the defense of fraud by making the enforcement of the instrument impossible.[5] By the great weight of authority in code states such de-

2 Haire v. Baxter, 5 N. Y. 357 (1851).

3 N. Y. Code of Procedure (Old Code), § 150; Code Civ. Pro. § 507. See Civ. Pr. Act, § 262.

4 Hancock v. Blackwell, 139 Mo. 440, 41 S. W. 205 (1897). A subsequent statute in Missouri provides for a reply of fraud in cases like this. See Non-Royalty Shoe Co. v. Phoenix Ins. Co., 277 Mo. 399, 210 S. W. 37 (1919).

5 Perry v. M. O'Neil & Co., 78 Oh. St. 200, 85 N. E. 41 (1908). In McIsaacs v. McMurray, 77 N. H. 466, 93 Atl. 115 (1915) the reply was treated as a bill in equity to cancel the release and thus permit enforcement of the law action. See 1 Cook Cas. Eq. 193, note. As Prof. Cook says, Equitable Defenses, 32 Yale Law J. 645, 650: "In short, then, the equitable proceeding for cancellation is affirmative merely in form. In substance it is, if we take a realistic view of things, truly an 'equitable defense' to the common law action on the instrument. For purely historical reasons, the *procedural law* required that the 'defense' be made effective by an affirmative proceeding in a separate court, rather than by pleading it in the court where the action on the instrument was pending." He adds

fenses as fraud, accord and satisfaction and mistake may be set up as defenses in law actions brought to enforce specialties and negotiable instruments.[6] This is also true in non-code states in

that "nothing seems clearer than that it was the obvious intention of the framers of the codes and the equitable defense statutes to abolish this absurd and antiquated procedure, and to permit the invalidity of the instrument . . . to be set up as a defense in form as well as in substance."

6 Thus in Dobson v. Pearce, 12 N. Y. 156 (1854), holding that a Connecticut decree, permanently enjoining the plaintiff from prosecuting an action on a New York judgment because he had secured it by fraud, could be set up as a bar to this suit brought later to enforce the same judgment, the court said: "Under the head of equitable defenses are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which at law, could not have been pleaded in bar. The facts alleged by way of defense in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are, therefore, proper matters of defense; and there was no necessity or propriety for a resort to a separate action to vacate the judgment." Accord, Bennett v. Edison Elec. Co., 164 N. Y. 131, 58 N. E. 7 (1900), Chicago & North West. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030 (1906), [holding a compromise and settlement of a negligence claim may be set up as a bar to an action on the claim]; Rogers v. Gwinn, 21 Iowa, 58 (1866); Ward v. Quinlivin, 57 Mo. 425 (1874), [fraud vitiating a judgment allowed as defense to action on the judgment]. In Rudolph Wurlitzer Co. v. Rossmann, 196 Mo. App. 78, 190 S. W. 636 (1916), the court held that mistakes of fact could not be set up by way of defense to a law action, saying that they "may be relieved in a court of equity, but are not cognizable in a court of law in a purely legal action." The mistake made in Hancock v. Blackwell, note 4, *supra*, dies hard in Missouri. As in a code state every action is a suit both at law and in equity to settle all questions, legal and equitable, at issue between the parties, this language of the Missouri Court indicates complete failure to appreciate either the purpose or accomplishment of the Code in that state.

Mistake as a defense, involved in the above case, raises the question Should it be pleaded as a counterclaim in order that equitable reformation may be had, or may it be pleaded as a defense only? This is a simple question of pleading to be settled by the same process by which purely legal defenses and counterclaims are distinguished. The sound view is that it may be pleaded as a defense provided the defendant asks for no affirmative relief, but only the barring of the plaintiff's action, by establishing the mistake. See Cook, Equitable Defenses, 32 Yale Law J. 645, 653, citing Lowenthal v. Haines, 160 App. Div. 503, 145 N. Y. Supp. 579 (1914); Schlosser v. Nicholson, 184 Ind. 283, 111 N. E.

which equity is still administered as a separate system, either by a separate court of equity or by the same judges who administer the law, under statutes which provide for the trial and disposition of such equitable defenses in law actions.[7] Some decisions

13 (1915); Gunn v. Madigan, 28 Wis. 158 (1871). The question is Must equity correct the mistake by compelling reformation in order to make the defense effective? In Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339 (1888), mistake pleaded as a defense was sustained. The court said, however, that the defendants should have pleaded it as a counterclaim, but the defect had been waived because the issue was tried as pleaded without objection to the form of the plea. No doubt it is true that if the defendant seeks affirmative relief under the contract as reformed, the mistake must be set up as a counterclaim. But when nothing is involved except the barring of the plaintiff's suit, mistake is a defense, like fraud. Lowenthal v. Haines, *supra*. The fact that equity enforces the reformed contract as in effect before the reformation, giving effect to the real intent of the parties as of its original date, proves that the "reformation" if made in fact, is a mere formality. Thus a loss suffered under an insurance policy before reformation was enforced against the Insurance Co. after the reformation though the property involved was not covered by the policy before reformation. Snell v. Insurance Co., 98 U. S. 85 (1878).

7 Plews v. Burrage, 274 Fed. 881 (1921), applying Judicial Code § 274b (Comp. Stat. § 1251b), Act of Mar. 3. 1913, providing in the federal courts, "That in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such cases as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea" . . . , holding that the plaintiff may set up by way of reply to a defense of a settlement that the settlement was procured by fraud, just as such defense may be set up by plea or answer by defendant. *Contra*, Keatley v. U. S. Trust Co., 249 Fed. 296, Judge Hand dissenting. See note (1923), 36 Harv. L. Rev. 474, construing Liberty Oil Co. v. Condon Nat. Bank, 43 Sup. Ct. Rep. 118 (1922), as indicating a tendency to treat this Statute as permitting cross bills only to establish equities as defenses to law actions. In that case the defendant was allowed to bring in additional parties to interplead them with the plaintiff. This is a clear illustration of a true counterclaim in which affirmative relief of an equitable kind was obviously required. Judge Taft held that this converted the action at law into an interpleader action in equity, so that the rules governing appeals in equity applied. There is no suggestion that defenses such as fraud must be set up as equitable cross bills or counterclaims. He said: "Section 274b is an important step toward a consolidation of the federal courts of law and equity, and

to the contrary assert that these are not defenses but affirmative actions which must be prosecuted in equity to final judgment before they can be used as defenses at law. These cases in effect nullify the statute and defeat its obvious purpose.[8] If affirmative relief is needed in addition to and beyond the mere establishment of a defense to the plaintiff's action, a counterclaim is necessary, which may be called a cross bill without doing any harm. Thus if the defendant brings in other parties by way of interpleader he is asking for affirmative relief which changes the nature of the action altogether, and his plea is necessarily a counterclaim.[9] So, also, if he asks for an affirmative judgment in his favor on the reformed contract in a case in which he pleads mistake, the pleading is obviously a counterclaim. Requiring the defendant to go through the ancient formula of asking for cancellation for fraud, or reformation because of mistake, when the sole purpose is to establish the invalidity of the plaintiff's claim as a defense, is to

the questions presented in this union are to be solved much as they have been under the state Codes. . . . Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if any issue at law remains, it is triable to a jury." He quotes Sutherland on Code Pleading:—"What was an action at law before the Code is still an action founded on legal principles; and what was a bill in equity before the Code is still a civil action founded on principles of equity." It is very clear that Judge Taft was in entire sympathy with the merger of law and equity under the Codes, and that he had clearly in mind the true effect of that merger.

8 Martin v. Smith, 102 Me. 27, 65 Atl. 257 (1906), holding that an omission by mistake from a mortgage deed cannot be set up in an action to recover possession thereunder, on the ground that the reformation of the deed required an affirmative action in equity, and the action at law was held to await the result of such an action, though the statute expressly provides that the defendant "shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff." Rev. St. Me. 1903, c. 84, § 17.

In Oregon the Code provides for equitable counterclaims in law actions, in which affirmative equitable relief may be given, whether as a bar to the law action or as further affirmative equitable relief. See Smith Portland &c. Co. v. Munger, 36 Ore. 457, 54 Pac. 815 (1898); Zeuske v. Zeuske, 55 Ore. 65, 103 Pac. 648 (1909). See also notes 4 and 5, *ante*.

9 See note 7, *supra*, particularly Liberty Oil Co. v. Condon National Bank, there cited.

insist on dragging into the reformed procedure the ancient nonsense which the Code eliminated.

In actions of ejectment, or to recover the possession of land, there is conflict in the cases as to whether the defendant can set up facts establishing a trust in his favor against the plaintiff as a defense to the action or as a counterclaim to establish his equitable rights against the plaintiff. In Code states it is difficult to see how any question of the defendant's right to do so can be raised. Any facts, which under the rules of law and equity combined, give the defendant the right of possession and ownership as against the plaintiff, must be received to bar the plaintiff's action. Thus where defendant pleaded that he held as tenant under another who had purchased the land in question with other land from the plaintiff's grantor, but the deed was by mistake so drawn that the land in question was not included, and that the plaintiff had purchased with notice, the New York Court of Appeals sustained the defense, because "according to the whole law of the land, applicable to the case," the defendant was entitled to possession as against the plaintiff. Under the merged law the equitable right of the tenant to possession under a lease from the equitable owner was sustained as against the plaintiff who had the technical legal title as purchaser with notice from one who had that title by mistake.[10] In Ohio the defendant's possession was sustained under a plea that in an action in another state he had secured a decree for the specific performance of a contract to convey the land in question to him. His equitable ownership barred ejectment by the plaintiff who had the legal title.[11] That ejectment will not lie against an equitable mortgagee in possession, the mortgagor's remedy being by action to redeem, is based on the same principle, viz., the mortgagee's equitable right of possession.[12] Under law and equity combined the defendant's right of possession is unquestioned in these cases, and therefore the plaintiff's action fails. The mode of trial of the issues of fact in such defenses, whether to the court or to the

10 Crary v. Goodman, 12 N. Y. 266 (1853); Hoppaugh v. Struble, 60 N. Y. 430 (1875), the same question arising between the original parties.

11 Burnley v. Stevenson, 24 Oh. St. 474 (1873).

12 Chase v. Peck, 21 N. Y. 581 (1860).

jury, has nothing to do with the validity of the defense. If the defendant seeks affirmative relief, then, as in the cases of mistake discussed heretofore in this section, a pleading by way of counterclaim is necessary. The question of trial by jury or by the court in code states will be discussed later.[13]

Under a statute in Wisconsin an equitable defense to an ejectment suit establishing a trust in favor of the defendant must be set up by way of counterclaim, asking for affirmative equitable relief as well as the barring of the plaintiff's action, so that final disposition of the entire controversy may be made.[14] But in spite of the statute in question, it is established law in Wisconsin that a deed given as security, and therefore an equitable mortgage, may be set up as a defense to an action of ejectment brought by the grantee thereunder, the equitable right of the defendant defeating the legal right of the plaintiff grantee exactly as in New York.[15]

In an ejectment suit in Minnesota proof of equitable ownership or trust as the result of a parol gift followed by possession and radical change of position by the donee was allowed under a general allegation that the defendant was lawfully seized and had good title to the premises.[16] If the judgment in ejectment may become part of the record of title as it unquestionably does in code states, there would seem to be no reason why the judgment in the ejectment suit should not operate to finally settle the title and ownership of the defendant arising out of the parol gift to him followed by possession and change of position. There is no real difference between a case of this kind and the other cases cited above in which the defendant's equitable right defeated the plaintiff's action in ejectment. No reason exists for a counterclaim in such cases unless further action is required to establish the defendant's ownership as a matter of record. The

13 See § 23, *post*.

14 Lombard v. Cowham, 34 Wis. 486 (1874). That this is an exception applying only to ejectment cases in Wisconsin, see Chicago &c. R. Co. v. McKeigue, note 6, *supra*, final paragraph of opinion.

15 Kent v. Agard, 24 Wis. 378 (1869). The soundness of this decision is recognized in Lombard v. Cowham, *supra*, but the attempt to distinguish it is hardly successful. To same effect, Dobbs v. Kellogg, 53 Wis. 448, 10 N. W. 623 (1881).

16 Hays v. Hays, 126 Minn. 389, 148 N. W. 125 (1914).

delivery of a deed by the plaintiff to the defendant in such cases would seem to be an unnecessary formality in code states with a single court of both law and equity able to determine *in rem* any question of title arising between the parties.[17]

§ 22. **Legal and Equitable Relief in Same Action.** Nothing can be plainer or more certain than that a primary purpose of the Code was to combine legal and equitable remedies between the parties to any controversy so that complete relief, legal and equitable should be given in a single action.[1] The great weight of authority establishes that this result has been actually accomplished in code states. Thus, in an action for specific performance, if it is established on the trial that specific relief cannot be given, the plaintiff may recover damages.[2] In states with separate systems of equity damages will be given if the plaintiff establishes his right to equitable relief, equity assuming jurisdiction to award damages in order to give complete relief and to avoid the need of an additional action at law,[3] but equity will

[17] In Oregon cross bills are required in such cases, note 8, *supra*. Oregon is one of the four Code states in which law and equity are kept distinct. See Clark Code Pleading, 19; Oreg. L. of 1920, §§ 1, 389. Even if a counterclaim and affirmative relief is required to completely settle the title is that a reason why the plaintiff should be permitted to disturb the defendant's undoubted right of possession under the merged law? As to the power of courts combining legal and equitable powers in code states to act *in rem*, settling disputed titles by decree, see §§ 10–14, *ante*.

[1] Article by Prof. Chas. E. Clark, The Union of Law and Equity (1925), 25 Col. L. Rev. 1, at pp. 3 and 4, and notes; Clark, Code Pleading, 46.

[2] Barlow v. Scott, 24 N. Y. 40 (1861), the court saying:—"It is competent for the court, under such circumstances, to grant any relief consistent with the cases made by the complaint and embraced within the issue (Section 275 of the Code), and the statement of the right of the plaintiff and its infringement by a defendant constitute such case as stated by Johnson, J., in Marquat v. Marquat, 12 N. Y. 336, 341; Phillips v. Gorham, 17 N. Y. 270; Truscott v. King, 6 N. Y. 165; Wiswall v. Hall, 3 Paige 314; Le Roy v. Platt, 4 Paige 77; New York Ice Co. v. Northwestern Ice Co., 23 N. Y. 357." The court held that trial of the issues to the court without objection waived the defendant's right to trial by jury.

[3] Appeal of Allison, 77 Pa. 221 (1874); Keppel v. Lehigh Coal & Nav. Co., 200 Pa. 649, 50 Atl. 302 (1901); L. Martin Co. v. L. Martin & Wilckes Co., 75 N. J. Eq. 39, 71 Atl. 409 (1908); 75 N. J. Eq. 257, 72 Atl. 294 (1908).

refuse to give damages in cases in which the plaintiff fails to establish any right to relief in equity.[4] This rule was changed in England by statutes in 1854 and 1858,[5] in which courts of equity were given power to award damages and courts of law to give specific relief in certain classes of cases. The Judicature Acts, which became operative in 1875, merged law and equity as under the New York Code, and thereafter all relief, legal and equitable, embraced within the issues created by the pleadings, has been given in the action which is both legal and equitable under the merged system of law and equity.[6]

Damages will, therefore, be given in actions brought to obtain specific performance or other equitable relief;[7] and specific or other equitable relief will be given in actions brought to recover damages,[8] provided the facts pleaded and the issues raised by the pleadings when determined establish the right to such relief.

4 Jesus College v. Bloom, Ambler 54, 27 Eng. Rep. 31 (1745); Gamage v. Harris, 79 Me. 531 (1887), also cases in preceding note.

5 17 and 18 Vict. c. 125, §§ 68, 79, 83 (1854); 21 and 22 Vict. c. 27 (1858).

6 Sayers v. Collyer, 28 Ch. Div. 103 (1884); Elmore v. Perrie, 57 L. T. 333 (1887). In Baunatyne v. MacIver (1906), 1 K. B. 103, Collins, M. R., said:—"Whether or not it could be recovered at common law . . . it is not necessary to decide . . . We have to apply the general law, legal and equitable."

7 Barlow v. Scott, note 2, *supra;* Marquat v. Marquat, 12 N. Y. 336 (1855), [holding that where the defendant has answered, "the court may grant the plaintiffs any relief consistent with the case made by the complaint and embraced within the issues. In case no answer has been put in, the relief granted cannot exceed that demanded in the complaint. *In the former case the demand of relief in the complaint becomes immaterial.* (Italics added) . . . The addition to these material facts of others, which neither show a right in the plaintiffs, nor a wrong thereto on the part of the defendants, do not add to or alter the legal case contained in the complaint." The court adds that such allegations may require an amendment if they make the pleading indefinite or uncertain, but they do not limit the plaintiff's right to give evidence or the court's power as to the nature or extent of the relief to be given]; Phillips v. Gorham, 17 N. Y. 270 (1858), [the court stating the question to be "one of mere variance and within the settled rules on that subject, created no bar to a recovery]"; White v. Lyons, 42 Cal. 279 (1871).

8 Emery v. Pease, 20 N. Y. 62 (1859), complaint, held insufficient to sustain law action on account stated, held sufficient to sustain the case as an action in equity for an accounting. "But relief is to be given consistent with the facts stated, although it be not the relief

Recent cases in New York create doubt of the principles so clearly and correctly established by the cases above cited. The Court of Appeals held in a case brought on the theory of an accounting between the parties as joint venturers, the answer denying a joint venture and setting up a contract to pay the plaintiff the reasonable value of his services, that a judgment rendered in the plaintiff's favor for the value of his services should be set aside and a new trial ordered. The court said it was not proper to give a judgment for damages as at law without amending the complaint, when the plaintiff failed to establish any right to the equitable relief which he sought. "Where . . . it appears that there never was any substantial cause for equitable interference, the court will not retain the action and grant purely legal relief. but will dismiss the complaint . . .

"The inherent and fundamental difference between actions at law and suits in equity cannot be ignored."[9]

specifically demanded (Code § 275) . . . A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled." To same effect, New York Ice Co. v. Northwestern Ins. Co., 23 N. Y. 357 (1861).

In Loeb v. Supreme Lodge &c. 198 N. Y. 180, 91 N. E. 547 (1910), the plaintiff failed to establish his right to equitable relief, but refused to have his case transferred to Trial Term for legal relief, insisting on a judgment based on his prayer for equitable relief. The trial court dismissed the complaint. Bartlett, J., said: "It would seem that no other course was left to the trial judge. If the plaintiffs saw fit to stand on their original position . . . they were entitled to test the soundness of that proposition on appeal" . . . In Gunn v. Madigan, 28 Wis. 158 (1871), defendant set up mistake as a defense to an action on a note, and the court directed that the issue of mistake be tried at a special term, but the defendant, insisting on trial by jury of the question of mistake, refused to take part in the separate trial of the equitable defense; judgment against the defendant was sustained, as the trial court properly directed trial by the court of the issue of mistake and the defendant refused to take part therein. In each of these cases the party entitled to relief under the merger of law and equity rejected it by his conduct. These cases are in accord with the general principles of such merger.

9 Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917). The referee found the facts to be as set up in the answer, after a trial in which the issue was whether the parties had undertaken to act as

It will be observed, however, that a new trial was ordered. No doubt the complaint was amended and the case tried thereafter at Trial Term. To dismiss the complaint after trial on the merits because the plaintiff has mistaken his right to equitable relief, though he has established his right to damages, as suggested in the *dictum* quoted above, is to spurn the Code and to repudiate long-established law in New York. In the federal courts and some of the non-code states, statutes provide that if the plaintiff has sued in equity when he should have sued at law, or *vice versa,* the case may be transferred to the proper court or term, and a motion to dismiss shall be regarded as a motion to so transfer the case, with provision for the due amendment of pleadings.[10] Can it be possible that New York, where merger of law and equity was initiated, is by judicial legislation to repeal the Code and throw New York law back into the absurdities of two competing systems, with duplication of effort and expense in dual actions involving the same controversy, and the scandal of opposing rules and conflicting results, made endurable only by equity's power to restrain the parties from seeking or securing the discredited remedy at law? Something more than reactionary *dicta* showing no trace of appreciation of the real problem will be required to accomplish such a result. In the case referred to all that is actually decided is that the case be retried, since the judgment for damages could not stand without amending the complaint by setting forth the contract on which the judgment was based. Obviously on the new trial the plaintiff should amend and proceed at Trial Term. It amounts, therefore, to a holding

joint ventures and share the profits or the defendant had merely employed the plaintiff to aid him for the reasonable value of his services. It was highly technical after trial of the entire controversy and judgment in accord with the facts as found, and as alleged in complaint and answer together, to hold that the judgment was void because the complaint had not been amended to conform with the proofs, answer, and judgment. However, the complaint did not set forth the contract on which the judgment was based, and the rule of pleading is that allegations set up in the answer cannot be used to sustain the complaint.

[10] See U. S. Judicial Code, § 274a, amended by Act of Mar. 3, 1915, c. 90, 38 Stat. 956 (Comp. Stat. 1251a)—See similar statutes in New Jersey and other non-code states. In Liberty Oil Co. v. Condon Nat. B., 43 Sup. Ct. 118 (1922), Justice Taft said these statutes "are long steps toward code practice."

that the complaint should have been amended so as to set forth the contract and ask for damages for its breach. Thus understood, it makes no change in the law which has prevailed since 1852, as set forth above, except, possibly, to require the amending of the complaint so that the action be made in form as well as in substance an action at law for damages, and that might require the amending of the prayer for relief, an amendment which is not required by the earlier cases.[11]

Nevertheless the *dictum* above quoted, accepted and applied literally by the Appellate Division, led to this indefensible result: In an action for specific performance where it appeared on the trial that specific performance could not be given, but that the plaintiff was entitled to the return of his deposit, the trial court permitted an amendment of the pleadings to conform with the proof, and a judgment for damages followed. This the Appellate Division reversed and ordered the dismissal of the complaint.[12] If this case is law then the merger of law and equity under the Code stands repealed by the Appellate Division and the many cases of the Court of Appeals cited above are overthrown.[13]

An action to rescind for fraud, and disposed of on the trial over the objection of the defendant as an action for damages

[11] In cases cited *supra*, notes 2, 7 and 8. In City of Syracuse v. Hogan, 243 N. Y. 457, 138 N. E. 406 (1923), the Court of Appeals expressly held that the prayer for relief does not control in determining the nature of the action and the relief to be given.

[12] Poth v. Washington Sq. M. E. Church, 207 App. Div. 219, 201 N. Y. Supp. 776 (1923). See additional cases with a like tendency cited in Clark, Code Pleading, 50, note 36, also recent cases *contra*.

[13] Barlow v. Scott, note 2, *supra*, is *contra* in every respect. In Saperstein v. Mechanics & Farmers Sav. Bank, 228 N. Y. 257, 126 N. E. 708 (1920), it appearing that specific performance for which the action was brought could not be had, the court said: "If, however, in addition to this equitable cause of action the facts as stated give rise to a legal liability then there should be no dismissal; the action remains to be tried. (Sternberger v. McGovern, 56 N. Y. 12; Margraf v. Muir, 57 N. Y. 155; Haffly v. Lynch, 143 N. Y. 241; Ohl & Co. v. Standard Steel Sections, Inc., 179 App. Div. 637). But it is now an action at law. Into such an action the plaintiff may not import equitable principles by demanding equitable relief to which he is not entitled." The court adds that performance of all concurrent and dependent promises, or waiver thereof, must be alleged and proved. The complaint was not dismissed but was sent to Trial Term to be tried as an action at law.

in fraud and deceit, was decided on the theory that the plaintiff had elected in favor of rescission, and therefore was not entitled to damages in fraud and deceit; but in the action for rescission, if it should develop that rescission cannot be had or that it would be inequitable for any reason, the court at Special Term may grant full damages in lieu thereof.[14] It is clear that these cases are not inconsistent with the doctrine of merger of law and equity.

The difficulty with the New York courts in some of the cases seems to be that there is a failure to grasp exactly what the merger of law and equity under the Code means. There is, of course, no change of either substantive law or equity except that in cases of conflict the spurious rule at law which has been overthrown by the conflicting rule in equity is eliminated. Equity has accomplished many reforms in the law by establishing rules and principles which the law has adopted, but these rules are not changed by being carried over into the law. In cases of actual conflict the rule in equity prevails and the discredited legal doctrine is overthrown, as we have seen.[15] Apart from this elimination of dead legal rules, no change is made in substantive law and equity through merger. Legal rights and equitable rights remain as before, subject to the same doctrines. Thus legal rights must be enforced according to legal rules, as in Saperstein v. The Bank.[16] In enforcing a legal right the courts will not carry into the case general equitable maxims or principles which apply only in enforcing equitable rights, such as the balancing of equities or the maxim that "he who comes into equity must do equity,"[17] or the doctrine of purchaser for value without notice, which doctrine does not cut off legal rights. Equitable rights are enforced in the merged system exactly as before, subject to the doctrine, for instance, of purchaser for

14 Merry Realty Co. v. Shamokin & Hollis R. E. Co., 230 N. Y. 316, 130 N. E. 306 (1921). The court reversed the judgment for damages, nothing appearing in the record to show that actual rescission could not be had as sued for, and directed that the case be disposed of on the new trial as stated in the text. See also Bradley v. Aldrich, 40 N. Y. 504 (1869).

15 See §§ 5 and 19, *ante*.

16 See *supra*, note 13.

17 Golde C. Shop v. Loew's Buffalo Theatres, 236 N. Y. 465, 141 N. E. 917 (1923). See note 21, *post*.

value without notice, as explained in a former chapter.[18] Legal rules and equitable rules are merely brought together into a single system enforced in a single action by a single court. The merged law, the action and the court are at the same time legal and equitable. This is really a very simple matter, and if our judges could be made to understand it, and what it means, most of the difficulties of application would disappear. There is no inherent difficulty in enforcing legal and equitable rights in a single action, where they arise in the same controversy. The clearest illustration of this merger under the Code is found in a New York case brought for a mandatory injunction ordering the defendant to remove an encroaching wall. The plaintiff in a former suit had secured a judgment in ejectment, but the sheriff returned the execution thereon stating that the removal of the encroaching portion of the wall was impracticable. The plaintiffs then made a motion for an order directing the defendant to remove the structure, which was denied, whereupon the action for a mandatory injunction was brought. The Court of Appeals reversed the judgment in plaintiff's favor and dismissed the complaint, for the reason that the Code merged in a single action the plaintiff's rights to relief against the defendant, whether legal or equitable, and he should have secured equitable relief by demanding it and establishing his right to it in the prior action which he had brought to recover possession; having failed to ask for such relief or having sought it ineffectively by the motion above referred to, he was barred from suing again.[19] This case holds, not only that the plaintiff *may* ask for both legal and equitable relief to which he may be entitled in the action, but also that he *must* seek such relief therein, at the penalty of being denied such relief in any later action based on the same facts. In a later case in which a mandatory injunction was sought and also further incidental equitable relief, a motion to transfer the case to Trial Term for jury trial was sustained by the Court of Appeals on the ground that the action was in substance an action of ejectment, and therefore the defendant was entitled to trial by jury.[20] This case in no way tends to depart from the principles involved in the Hahl case.

18 See § 19, *ante*.

19 Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901).

20 City of Syracuse v. Hogan, note 11, *supra*.

It decides only that the motion to transfer the case to Trial Term should be granted. Undoubtedly the equitable relief sought, if needed, could be granted by the court in connection with the judgment in ejectment, exactly as it could have been granted in the original Hahl ejectment suit if the plaintiff had sought such relief in that action.[21]

In applying the principles of code merger, the court, with full power and in duty bound to grant legal or equitable relief or both as justice may require under the pleadings and proof, acts as a court of law in giving legal relief, using the jury where the right to trial by jury exists and has not been waived, and as a court of equity in giving equitable relief.[22] The court is called on to decide, as in the ejectment cases discussed above, whether or not legal relief will be adequate, or whether specific relief will more adequately do justice between the parties. The court has at its command both forms of relief, and is bound, under the Code, to give all the relief which justice demands within the limits of the pleadings and proof. The rest is matter of pleading and practice. Under the cases the relief asked for controls, prior to the answer.[23] If the defendant demurs or moves to dismiss on the pleadings, the cases are in conflict as to whether the prayer for relief controls, or whether the complaint

21 In Golde C. Shop v. Loew's Buffalo Theatres, note 17, *supra*, an ejectment suit by a tenant against a landlord who had made extensive improvements while in possession under a dispossess warrant subsequently set aside, the court held that ejectment in the law form was the proper remedy, as the sheriff had ample power to execute the writ. No removal of buildings was involved. In Johnson v. Purpura, 208 App. Div. 505, 203 N. Y. Supp. 581 (1924), a judgment in ejectment, which also contained an order directing the defendant to remove the encroachments, was modified by striking out the provision ordering such removal as unnecessary to protect plaintiff, because under Civ. Pr. Act, § 505, the defendant may be punished for contempt if he does not comply with the judgment in case it cannot be enforced by execution, quoting to that effect from Syracuse v. Hogan. It is, of course, obvious that the statute and the language of the Court of Appeals means nothing of the kind. Punishment for contempt requires disobedience of an order such as that stricken out. The Golde case is in entire accord with Hahl v. Sugo and Syracuse v. Hogan. The Johnson case was decided on an obvious misconstruction, and does not turn on the question here discussed.

22 See § 23, as to trial by jury in such cases.

23 Clark, Code Pleading, 180, 181, 183.

may be sustained as calling for different relief under the facts set forth therein.[24] Even if the complaint is not sustained the plaintiff is given leave to amend on terms and the case will then be sent to Trial Term or Special Term, as the amended complaint may require, so that full relief may be given without the need of a new action.[25] After answer, the prayer for relief will in no way prevent the giving of relief, legal or equitable or both, which the facts set forth in the complaint and established on the trial demand.[26] We have progressed far beyond the narrow and fundamentally wicked state of the law which denied a party relief to which he was clearly entitled under the facts of his pleading as established on the trial merely because he had mistaken his remedy in his prayer for relief. If the facts set forth in the complaint do not entitle the plaintiff to relief, dismissal must follow unless the complaint may be amended so that the judgment may conform with the proof if further or different facts are established on the trial, or prior to the trial on motion therefor, if justice demands such amendment. Many of the cases above cited or discussed illustrate the power of courts to amend though the amendment of the complaint results in the granting of equitable instead of legal relief, or *vice versa,* or the granting of both forms of relief in the same action, where the complaint before amendment was insufficient to sustain one or the other form of relief. The amending of pleadings is a matter of practice, and is subject to the discretion of the court within the limits of rules laid down by the Code, and need not be gone into here.[27] These matters of pleading and practice

24 *Ibid.* 182, cases cited, note 156.

25 This was the normal practice in cases in which demurrers were sustained under the New York Code. Surely no change has been made in that respect by the abolition of demurrers under the Civil Practice Act. Some of the recent decisions of the lower courts in New York, dismissing the complaint asking for equitable relief, and refusing to hold the cases for Trial Term on the question of damages under the pleadings, are so obviously contrary to the Code and to settled law thereunder that they may probably be disregarded as unworthy of serious consideration. See list of recent cases cited as so holding, and cases holding to the contrary, Clark, Code Pleading, 50, note 36. See *supra,* notes 9 and 12.

26 Clark, Code Pleading, 183, 184, Syracuse v. Hogan, above cited, stands flatly for the proposition that after answer the prayer for relief does not control.

27 On the question of amending the complaint in these cases see Clark, Code Pleading, Ch. 12.

apply to all actions under the Code irrespective of whether the relief involved is legal or equitable or both. Does the complaint set up and the proof establish facts requiring either or both forms of relief? If it does not, should an amendment be allowed in the interests of justice so that the real controversy may be tried and determined? These questions must be decided in every case, and their determination will turn on the same principles whether the relief sought is legal or equitable or both. Therefore the question of merger of law and equity is not directly involved in most of these cases. It is unfortunate that so much ill-considered *dicta* has appeared in some of the cases involving these matters which seem to question the actual accomplishment of this primary purpose of code reform.

§ 23. **Trial by Jury in Cases Combining Legal and Equitable Issues.** The supposed difficulties incident to the merger of legal and equitable relief in the same action arising out of essential differences between the two forms of relief and between the rules and principles on which such forms of relief depend, disappear, as explained above, when the true nature of the merger as simply bringing law and equity together is understood.[1] But, it is argued, trial by jury in nearly all issues of fact in law cases is preserved by the Constitution. If the facts must be found by a jury in the "civil action" of the Code, then it is still an action at law as distinguished from an action in equity, and the Code provision abolishing the distinction between actions at law and suits in equity is futile.[2] The constitutional provision referred to makes necessary the separate maintenance of trial terms for the trial of jury cases, while cases triable without a jury are disposed of in special terms, every case being noticed for trial and placed on the calendar of one or the other of these two sides of the court, depending on the form of trial required. This creates at least an appearance of distinct separation between "actions at law" and "suits in equity," in spite of the Code, as the cases on the General or Trial Term calendar are law cases in the former sense, while the cases on the Special Term calendar are equity cases.

1 See § 22, *ante*.

2 Seldon, J., in Reubens v. Joel, 13 N. Y. 488, § 20, note 3, *ante*.

Nevertheless jury trial and the necessary maintenance of trial terms for law cases in the old sense do not prevent the merger of systems, actions and courts as expressly provided in the Code. The objections to merger because of jury trial are based on the same fundamental misconception of what the merger is, the same insistence upon the retention of old forms of action discussed in the preceding section. Just as the bringing together of law and equity does not change substantive equity or genuine substantive law, so also it does not change, and was not intended to change, the methods of trial of issues of fact used in applying legal and equitable remedies. It simply brings both together in the same case when issues involving substantive law and equity arise in the same controversy. The most frequently arising situation of this kind is a law action in which is interposed an equitable defense or counterclaim, discussed in detail in § 21. Whether the suit be an action to enforce a specialty or negotiable instrument, or an action of ejectment or other action at law, it is clear that it comes within the constitutional provision preserving jury trial, and it must be filed on the General Term calendar for jury trial. On the trial, issues of fact in connection with the equitable defenses of fraud, accord and satisfaction, mistake, or an equitable right or title arising as an express or implied trust, may be tried to the court without submitting such issues to the jury, which is the general practice, or may be tried to the jury with the issues of fact involved in the plaintiff's case, without distinction or difference, the entire case, legal and equitable, being submitted to the jury by the court's charge, their verdict to depend on how they decide the issues of fact under the law, legal and equitable, as given them by the court. The rule which generally prevails is that issues of fact in deciding the equitable defense or counterclaim will be decided by the court without reference to the jury, though the court may in its discretion submit the entire controversy to the jury when that method seems the more effective.[3] This is strictly in accord with the principles of merger of law and equity. Law issues are disposed of by jury trial and equity issues by trial to the court,

3 Gunn v. Madigan, 28 Wis. 158 (1871). See long list of cases from Cal., Colo., Idaho, Iowa, Ky., Mont., Neb., N. D., Nev., Ohio, and several other states in Clark, Code Pleading, 61, 62, note 70.

without change in the form of trial of either kind of issue, but combining both in the same action and in the same trial, saving the expense and delay of separate actions and trials, and eliminating the conflict which made it necessary that equity should restrain the parties from prosecuting their legal remedy pending the trial of the case in equity. In a few states, however, specific provisions of the Code in those states have been construed as requiring trial by jury of the entire controversy unless the equity is set up as a counterclaim.[4] In New York the practice has been to submit the entire case to the jury, and that practice had much to do with the decision of the Court of Appeals in 1925,[5] which seems to commit New York to the minority theory, that trial to the jury of equitable defenses is necessary in such cases, the court resting its decision on the language of the New York Statute, and also on the fact that such has been the practice in New York of trial courts, though that practice may have been based on the discretion of the court rather than upon strict statutory requirements. This decision of the Court of Appeals is unfortunate. It is not in accord with the well-settled law that the provisions of the Code listing actions which must be tried by jury are declaratory of existing law, making no change, as explained hereafter.[6] It involves the idea that the actions so listed include issues arising in equitable defenses as part of such actions, though if the plaintiff asks for equitable as well as legal relief the Code provisions are construed as applying only to the legal issue, not the equitable one. It should be obvious that the equitable issue in both classes of cases is still equitable, and therefore triable to the court whether it be in form a defense or an affirmative action or a counterclaim.[7]

4 King v. International Lumber Co., 156 Minn. 494, 195 N. W. 451 (1914); Citizens Trust v. Going, 288 Mo. 505, 232 S. W. 996 (1921). The Missouri cases hold that if the equitable defense is set up as a counterclaim asking for affirmative relief the trial of the counterclaim will be to the court, not the jury. See Missouri cases cited, Clark, Code Pleading, 63, note 73.

5 Susquehanna S. S. Co. v. A. O. Anderson & Co., 239 N. Y. 285, 146 N. E. 381 (1925).

6 See paragraph following, notes 9 and 10.

7 As to the pleading of some equitable defenses as counterclaims, see § 21, *ante*. The Court of Appeals, in regarding equitable counterclaims and issues involving affirmative equitable relief sought

In the cases discussed in the preceding section, in which the right to both legal and equitable relief in the plaintiff's favor is involved, or the facts pleaded establish a right to damages though the action is brought to secure equitable relief, or *vice versa,* the true solution is found in the same way, by applying the Code as merely bringing law and equity together in a single action in which both forms or either form of relief may be given without changing substantive law or equity or the method of trial by which issues of fact at law, and issues of fact in equity, may be determined. The express provisions of the Code in the majority of code states enumerate the actions in which the right to trial by jury shall exist.[8] Almost uniformly these statutes are construed as declaratory of the actions at law in which the right of trial by jury existed when the constitutional provision was established.[9] The New York Code provides that the trial must be by jury unless waived or a reference is directed in the following cases:—"1. An action in which the complaint demands judgment for a sum of money only. 2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel."[10] An action for a money judgment under this

with legal relief in the same action as triable to the court, while mere equitable defenses are triable by jury, seems to regard the two former classes of cases as equitable while equitable defenses become "legal" by being made available as defenses in law actions, *viz.:* they become merged with such actions so as to be brought within the statutory list of actions in which jury trial is mandatory. This, however, is a mistake. If an equitable right or remedy is involved it is no less equitable when raised as a defense, a counterclaim, or as a cause for equitable relief in connection with an action for legal relief, and the issue should be tried in the same way in all three classes of cases. The practice of trial courts in New York in submitting the entire controversy to the jury need not be criticised if it be recognized that it is based on the court's discretion, not mandatory under the statute. The latter position involves a definite departure from the principles governing code merger of law and equity, and may do much harm.

8 See references to Codes of many states; Clark, Code Pleadings, 56, note 51. The Connecticut Statute is especially clear and effective. Conn. Gen. St., 1918, § 5752. "All matters which, prior to Jan. 1, 1880, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, unless otherwise ordered, shall be heard and decided by the court without a jury, in the manner theretofore practised by courts of equity."

9 See cases cited, 35 Corp. Jur., 159 *et seq.;* Clark, Code Pleading, 59, note 62.

10 N. Y. Civil Pr. Act, § 425.

provision is construed as meaning a common law action in contract or other action at law for a sum of money, not an action of account in equity, nor an action to reform a contract and to enforce it as reformed.[11] "For a Nuisance" does not include actions in equity for an injunction and damages.[12] In other words the Code makes no change in rights to jury trial, leaving them as under the Constitution, except in certain special cases in which the purpose of extending jury trial is obvious.[13] Much of the uncertainty and confusion under the cases on the question of code merger of law and equity have developed in determining whether the case should be tried with or without a jury. Insistance that the plaintiff assert and establish the theory of his action has often been for the purpose of determining the proper place and form of trial. But the basis of code pleading is that the facts be pleaded, and that such relief as the facts require be given after the facts have been established on the trial. We have seen that after joinder of issue, the relief given must depend on the facts as pleaded and proved irrespective of the pleader's original theory of his action or his prayer for relief.[14] It is only where the facts are ambiguous that the prayer for relief may control the action of the court, and even in such cases the suit may be saved by amendment.[15] In these cases, even more clearly than in cases of equitable defenses, trial by jury is in no way inconsistent with code merger of law and

11 Phillips v. Gorham, 17 N. Y. 270, § 22, note 7, *ante;* Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167 (1901); Murtha v. Curley, 90 N. Y. 372 (1882); Baily v. Hornthal, 154 N. Y. 648, 49 N. E. 56 (1898). Another familiar situation is foreclosure with demand for deficiency judgment, Di Menna v. Cooper &c. Co., 220 N. Y. 391, 115 N. E. 993 (1917). But see Susquehanna S. S. Co. v. A. O. Anderson & Co., 239 N. Y. 285, *supra,* note 5, discussed in prior part of this section.

12 Shepard v. Manhattan R. Co.. 131 N. Y. 215, 30 N. E. 187 (1892); Miller v. Edison Elec. Illuminating &c. Co., 184 N. Y. 17, 76 N. E. 734 (1906). See (1925) 25 Col. L. Rev. 641; (1927) 27 Col. L. Rev. 307.

13 N. Y. Civ. Pr. Act, § 1149, providing for jury trial in actions for divorce on the ground of adultery.

14 See § 22, *ante,* notes 1–3. City of Syracuse v. Hogan, § 22, note 11, *supra,* holds: "The prayer for judgment is not decisive and does not control the nature of the action."

15 O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 37 (1894). See Clark, Code Pleading, 185, and notes.

equity. Assuming that the facts pleaded call for legal relief, and that is a matter of law for the court to decide, irrespective of the plaintiff's theory, the case should be sent to the jury calendar for trial; if on the trial equitable relief is needed instead of or in addition to legal relief, the judge presiding is a court of equity with full power and in duty bound to grant any relief which justice requires within the facts as pleaded and established. The ejectment cases in New York discussed above [16] illustrate this perfectly, and far from showing a state of hopeless confusion sometimes attributed to them,[17] they establish and exemplify very exactly how the merger of law and equity is practically applied. If the facts as pleaded set forth causes for both legal and equitable relief, as in Syracuse v. Hogan,[18] one of the cases above referred to, the case should be sent to the jury calendar if trial by jury is not waived, since a jury trial of the law issues is mandatory under the Constitution. The equitable issues may be tried to the court, in such order as the court may determine, whether before or after the jury trial, or in connection therewith, and full relief given as the established facts require. Many of the cases above referred to are examples of suits for equitable relief, tried as such without a jury, in which for one reason or another equitable relief could not be given, but retained for the purpose of giving a judgment for damages. If the defendant waives a jury trial, and the element of surprise to the defendant is not involved, the court gives judgment at once.[19] If a jury trial is demanded by the defendant the case must be sent to the jury calendar for trial at Trial Term, and an amendment may be ordered and further time given if the original pleading fails to give the defendant reasonable notice of the facts on which the modified legal relief is based.[20]

It will be noted that in every such case the action remains the same. Any relief, legal, equitable or both, called for by the facts pleaded and later proved, must be given. The method and

16 § 22, notes 19, 20, 21.

17 See articles by Prof. Rothschild (1924), 24 Col. L. Rev. 739, (1923) 23 Col. L. Rev. 622. Johnson v. Purpura, there discussed, is so obviously wrong that it may be disregarded. See § 22, note 21, *ante*.

18 § 22, note 11, *supra*.

19 See cases cited § 22, notes 2, 7, 8, *ante*.

20 On the question of amendments see Clark, Code Pleading, 505–507.

place of trial are merely incidents of bringing law and equity together in the same action. Waiver of trial by jury, though frequent in such cases, and advisable as saving time and expense, is immaterial so far as merger of law and equity is concerned.

§ 24. Merger Prior to the Code—The Lien Theory of Mortgages. Merger of substantive law and equity had developed to a considerable extent long before the period of the Codes. The law took over the jurisdiction of equity over contracts where debt and covenant would not lie by the development of assumpsit, equity retaining jurisdiction only in specific performance cases.[1] A very broad field of equity became concurrent at law in practical effect by the development of *quasi* contract in the form of general assumpsit.[2] The development at law of the doctrine of the assignment of choses in action made the equitable doctrine concurrently legal as well.[3] Other instances of equitable rules or principles accepted and applied at law and becoming concurrently legal and equitable as a result of this process are the enforcement of lost or destroyed instruments by admitting secondary evidence of their contents after accounting for the absence of the original,[4] and the doctrine of estoppel carried over into the law as a defense in ejectment and other cases.[5] But by far the most important and striking instance of this merger by adoption at law of equitable principles and rules is the development of the lien theory of mortgages.

Equity made at least a start toward relieving mortgagors in the fifteenth century as part of its jurisdiction in giving relief against penalties.[6] The obvious conflict between law and equity in the enforcement of mortgages resulting from equity's interference has been explained heretofore.[7] The mortgagor was allowed to redeem on payment of the full amount due, with in-

1 5 Holdsworth, Hist. Eng. Law, 322, Barbour, 4 Oxford Studies, 40 *et seq.* For development of assumpsit, see Ames, Hist. of Assumpsit, 2 Harv. L. Rev. 2, 53.

2 See § 19, *ante*, and Chapters XX and XXI, *post*.

3 See § 19, *ante*, notes 25 to 29, inc.

4 See § 4 and § 19, *ante*.

5 See Hinton, Equitable Defenses (1919), 18 Mich. L. Rev. 726, citing Kirk v. Hamilton, 102 U. S. 68 (1880).

6 5 Holdsworth, Hist. &c. 293.

7 See § 5, *ante*.

terest, and the mortgagee was compelled to reconvey to him, at first only in special cases where excuse for failure to pay the mortgage debt was shown, such as accident,[8] and later, mere negligence.[9] By the time of James I, the right to redeem was definitely established under the principle of relieving from a penalty,[10] and the mortgagee's right of foreclosure developed in equity as a means of limiting the mortgagor's equity of redemption and of enforcing the mortgagee's security. By an Act of 1734[11] the law courts were given power to order discharge of the mortgage and to require a reconveyance by the mortgagee, if, in an action to collect the debt or to recover the land in ejectment, the mortgagor had tendered the amount due with interest This as a practical matter established the substantive rights of ownership of the mortgagor and the right of security of the mortgagee at law as well as in equity. The old common law rule that the mortgagor was only a tenant at will of the mortgagee whose title became absolute on the mortgagor's default, had become so contrary to existing fact and prevailing law that Lord Mansfield said: "A mortgagee notwithstanding the form has but a chattel, and the mortgage is only a security . . . It is an affront to common sense to say the mortgagor is not the real owner."[12] As a matter of fact the real interests based upon the true intent of the parties were never in doubt. The technical legal view was simply giving effect to the mere form of the mortgage, disregarding its true nature based on the actual intent of the parties, and this defect in the law made equity's intervention necessary. For many practical purposes judges at law recognized the equitable rights of the parties as the actual rights involved, in disregard of the technical legal theory. Thus the mortgagor was held by courts of law to be the owner in determining the acquiring of a settlement under the poor laws,[13] in determining the right to shoot game,

8 Sel. Cas. Chan. (S. S.) No. 39; Atkinson v. Harman, Phil. & Mary, Cal cxlii.

9 1 Spence, Equity, 602, 603.

10 Kerly, Hist. of Equity, 143. In Bacon v. Bacon, Toth, 133, 21 Eng. Rep. 146 (1640), the court declares it will relieve a mortgagor "to the tenth generation." See Walsh, Hist. &c. 486.

11 7 Geo. II, c. 20.

12 King v. St. Michaels, 2 Doug. 630, 99 Eng. Rep. 399 (1781).

13 Lloyd, Mortgages—The Genesis of the Lien Theory, 32 Yale Law Jour. 233, 239, citing King v.

the mortgagor qualifying as owner under the statute,[14] and by statute [15] in determining his right to vote as owner of a freehold estate.

In New York by a colonial statute of 1701 the right to vote based on land ownership, was assured to the mortgagor in possession.[16] In 1804 it was established in New York that the mortgagor's interest was subject to sale on execution,[17] contrary to the English cases which still treated the mortgagor as having an equitable interest to be reached by bill in equity. A little later, in holding that the mortgagee's interest could not be sold on execution, Kent, C. J., said:—"Whenever the nature of the case would possibly admit of it, the courts of law have inclined to look upon a mortgage, not as an estate in fee, but as a mere security for a debt." [18] That the mortgagor, not the mortgagee, is the legal owner for purposes of inheritance, attachment, execution and dower, soon became the settled law, not only in the so-called "lien" states, like New York, but also in Massachusetts and other "common law" states which are supposed to adhere to the common law doctrine that the legal title passes to the mortgagee.[19] In 1814 the New York courts decided that the

Edington, 1 East, 288 (K. B. 1801) and several other cases.

14 *Ibid.* citing Wetherell v. Hall (K. B. 1782), Caldecott, 230.

15 7 & 8 Wm. III, c. 25, § 7 (1696). The statute provided that the mortgagor and *cestui que trust*, in possession, should have the right to vote, based on their ownership, not the mortgagee or trustee.

16 Colonial L. of N. Y., 452, 453.

17 Waters v. Stewart, 1 Caines, Cas. 46 (1803), Mr. Lloyd's Article, *supra*, p. 242.

18 Jackson v. Willard, 4 Johns 41 (N. Y. 1809).

19 Blanchard v. Colburn, 16 Mass. 345 (1820); Eaton v. Whiting, 3 Pick. (Mass.) 484 (1826); Huntington v. Smith, 4 Conn. 237 (1822); Collin's Widow v. Torrey, 7 Johns. 278 (N. Y. 1810), [dower]. As to dower see additional cases cited, Walsh, Property (2nd Ed.), 169, note 3. Failure of the so-called "common law" states to live up to the theory that the mortgagee is the legal owner is established in all cases arising between one of the parties and a third person, as in the instances above referred to. *Contra* to this, they have held that the mortgagee is the proper party to sue in conversion a wrongful taker of trees, fixtures or other part of the realty from the mortgaged property. Searle v. Sawyer, 127 Mass. 491 (1879), and cases cited therein. In equity, however, he is charged with what he collects as trustee, to apply same toward the mortgage debt and interest. If the mortgage debt is not due at the time, the result of permitting the mortgagee to recover in these cases is obviously contrary to the con-

mortgagor was seized of the freehold, and that the defendant could not justify his trespass by a license from the mortgagee.[20] Thus at a very early date New York definitely established that the mortgagor is owner and entitled to possession both at law and in equity, and the great majority of the states have followed New York in adopting this so-called "lien" theory of mortgages.[21] It is clear that this is simply the result of the law courts adopting as a practical matter the equity view that the mortgagor is the real owner and that the mortgagee has only a prior right of security in the mortgaged property, eliminating

trolling rights of the mortgagor in equity. In lien states the mortgagor alone can maintain the action. Cooper v. Davis, 15 Conn. 556 (1843); Wilson v. Maltby, 59 N. Y. 126 (1874). As between mortgagor and mortgagee, however, the common law states give the mortgagee the right to recover possession from the mortgagor, and to collect rents accruing under leases made prior to the mortgage after notice to the tenant, as well as rents under leases made subsequent to the mortgage after the mortgagee recovers possession, but he must account in equity for all amounts so received and for all profits derived from his possession, as mortgagee in possession, so that the net result is to give him such additional security as possession may afford him, but with no beneficial rights of ownership in any other respect. See cases reported and cited, Kirchwey's Cases Mortgages, 313–343, 543–563; 2 Tiffany, Property (3d Ed.), 2425, 2426, 2438–2441. That the mortgagee's interest is treated as personal property on his death, passing to his personal representative as incident to the mortgage debt in the common law as well as the lien states, see 3 Tiffany, *ibid.* 2423, cases cited, note 70, and Statute, 44 & 45 Vict., c. 41, § 30, changing the English rule, that his heir took as trustee for the personal representative, by the provision that his interest passes to the personal representative. For list of states retaining in some measure the common law theory of mortgages see 3 Tiffany Real Prop. (2d Ed.), 2361, note 7. In most respects Connecticut and New Jersey follow the lien theory, New Jersey, however, treating the mortgagee as legal owner after default by mortgagor. Shields v. Lozear, 34 N. J. Law, 496 (1869).

20 Runyan v. Mersereau, 11 Johns. 534 (N. Y. 1814). See additional N. Y. cases confirming the mortgagor's right of possession as against the mortgagee, Mr. Lloyd's article, *supra.* In 1828 a statute provided that the mortgagee or his assignee could not maintain ejectment against the mortgagor, 2 Rev. St. pt. 3, Ch. 5, § 57.

21 See list of states in which the lien theory prevails in 3 Tiffany Real Prop. (2d Ed.), 2361, note 8. The extent to which the other states have adopted the lien theory in practice, though retaining the common law theory for certain limited purposes, is indicated in note 19, *supra.*

the technical title of the mortgagee. This was forced upon the law courts because the technical common law doctrine was so completely at variance with social and economic conditions, and with the actual law by which the rights of the parties were determined in equity, that even the pretense of giving effect to the technical legal title of the mortgagee was dropped as a matter of common sense. This development came long before the Code in New York, a clear forerunner of the merger of law and equity in other respects which the Code accomplished. In the thirty states and territories which have adopted the Code the modern lien theory necessarily prevails. The actual rights of mortgagor and mortgagee must be recognized and enforced when law and equity are combined in a single system. In some of the other states the lien theory was established without the aid of any statute, based on the reasoning which brought it into existence in New York.

The merger of law and equity in practical effect eliminates the legal title of the mortgagee in that the rights of the parties are worked out as though it did not exist. The equity view is adopted at law, and the spurious legal view is dropped. There was no need to keep alive this technical legal ownership and to work out the rights of the mortgagor as an equitable right dependent thereon enforceable by *in personam* procedure in equity, as there was in trust cases in which the trust relation established by equity necessarily involved legal ownership in the trustee. It has been said that for the purpose of applying the doctrine of estoppel the New York courts still recognize the legal title of the mortgagee.[22] But *dicta* in some of the cases to that effect was entirely unnecessary to their decision. A mortgagor who executes a mortgage before he has title, and subsequently acquires title to the property so mortgaged, is estopped from denying the validity of the mortgage, whether we regard it as a deed conveying title or a deed creating a security by way of lien. All the elements of equitable estoppel exist on either theory.[23] *Dicta* in other cases, explaining the transfer of the

22 Reeves, Real Property, Special Subjects, § 461. See Mr. Lloyd's article, *supra*, p. 244.

23 Mickles v. Townsend, 18 N. Y. 575 (1859); Tefft v. Munson, 57 N. Y. 97 (1875). It is clear that having executed the mortgage as security without title, any title which the mortgagor subsequently acquires will inure to the benefit of

mortgagor's title as of the date of the mortgage to the purchaser on foreclosure as the result of the mortgage operating as a deed of conveyance, are equally unnecessary. The enforcement of the mortgage as a lien arising as of the date of the mortgage necessarily has that result.[24] It is submitted that in one class of cases the technical legal title of the mortgagee must still be recognized, though no case decided under the lien theory has as yet so held. If a joint tenant mortgaged his interest to another at common law the mortgagee took as tenant in common, the mortgage deed breaking the unities of time and title. The same result must follow in lien states, for if we hold that the unities are not broken, then the "lien" of the mortgage must be wiped out on the death of the mortgagor by survivorship, just as a judgment lien would be, which would mean that no one would accept such precarious security. Surely a joint tenant may mortgage his interest as freely as he may convey it, and therefore it must be held that the unities are broken by his mortgage under the modern theory as at common law. In fact the technical legal title passes to the mortgagee who holds it by way of security—something more than a mere lien. In every other situation the law disregards this legal title, giving effect to his equitable right of security only. In determining the effect of a mortgage on a joint tenancy, a technical common law estate, the courts are bound to recognize that the technical title passes, breaking the unities as at common law.[25]

the mortgagee. The mortgagor will be estopped to deny the validity of the mortgage executed by him before he acquired title, whether the technical legal title passes or an interest by way of lien is created by the mortgage in the mortgagee. The talk in Tefft v. Munson, *supra*, about estoppel by deed at law as distinguished from equitable estoppel, so that it is not cut off by conveyance of the legal title to an innocent purchaser for value, is simply unthinkable in a code state. Are we to have *two* doctrines of estoppel, one clearly inconsistent with the other, in the same system of law administered by one court in a single action combining law and equity? That case is also wrong in its application of the Recording Act. The mortgage in question was not in the chain of title, since not made by the record owner, and therefore its record was not constructive notice to the subsequent purchaser. See Walsh, Property (2d Ed.), 777.

24 Rector Christ's Church v. Mack, 93 N. Y. 488 (1883).

25 See Walsh, Property (2d Ed.), 351, 352. A possible alternative would be to regard the mortgage as breaking the unity of interest, in that the joint tenants would neces-

Does the merger of law and equity as to mortgages result in changing the mortgagor's "equity" into a legal estate, so that a purchaser for value without notice will take it free of prior equities? There is no doubt that it does. This is clear when we consider cases of assignments of mortgages by mortgagees. The mortgagee transfers a chose in action, subject to all defenses, though the transfer be made to a purchaser for value without notice, except in cases of negotiable paper secured by mortgage.[26] The carrying over into the law of the equitable view of mortgages involves recognition of legal ownership in the mortgagee. This necessarily changes the doctrine of purchaser for value without notice in these cases, which turns on the transfer of *legal* titles to such purchasers. Though in states which still adhere to the common law theory a conveyance by a mortgagor is an assignment of an equitable title only, and therefore subject to prior equities,[27] there can be no doubt that in lien states the mortgagor has the legal title, so that an innocent purchaser from him takes free of prior equities.[28] In common law states mortgages can be assigned only by deed since conveyance of the legal title to land is involved. Does it follow in those states that an innocent assignee for value takes free of prior equities? He does not, because in equity he holds as assignee of the debt

sarily have different interests after one mortgages his interest, but that argument assumes the point at issue, viz., that the mortgage is superior to the right of survivorship.

26 Crane v. Turner, 67 N. Y. 437 (1876); Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E. 1052 (1894); Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387 (1901). That an assignee of a negotiable note and mortgage securing it may enforce the mortgage as an innocent purchaser for value just as he may enforce the note free of prior equities, see Carpenter v. Longan, 83 U. S. 271 (1873); Watson v. Wyman, 161 Mass. 96, 36 N. E. 692 (1894); Paige v. Chapman, 58 N. H. 333 (1878); Dutton v. Ives, 5 Mich. 515 (1858); Kelly v. Whitney, 45 Wis. 110 (1878); Gould v. Marsh, 1 Hun 566 (N. Y. 1874); Trustees of Union College v. Wheeler, 61 N. Y. 88 (1874), (*dicta*).

27 Grover v. Flye, 5 Allen (Mass.) 543 (1863).

28 The mortgagor may convey or mortgage the property as he pleases, it passes to his heirs on his death, legal title is in him for every purpose, including, obviously and apparently without question in the cases, the transfer of such title to an innocent purchaser for value. See Tiffany Real Prop. (2d Ed.), § 609

which the mortgage secures, and like any other assignee of non-negotiable choses in action, he takes subject to prior equities.[29]

Equitable mortgages, viz., cases in which money is loaned or credit given relying on a promise to give a mortgage on specific property, or on an agreement that such property shall be security for the debt so created,[30] including also cases of absolute conveyances enforced in equity as mortgages because actually given as security for a debt,[31] are instances of purely equitable rights, in no way changed by merging them with the law in a single system under the Code. There is no change in the technical legal title by such merger, and the equitable right, as in all other cases of purely equitable rights, so merged with the law, remains equitable in that it is cut off by conveyance of the legal title to a purchaser for value without notice.[32] There is no doubt that as a result of code merger the rights of the equitable mortgagee and of the equitable mortgagor will be protected and enforced by applying the equitable doctrine though

29 Matthews v. Wallyn, 4 Ves. 118, 31 Eng. Rep. 62 (1798); Fish v. French, 15 Gray (Mass.), 520 (1860); Olds v. Cummings, 31 Ill. 188 (1863); Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671 (1898); Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150 (1893).

30 Burdick v. Jackson, 7 Hun. 488 (N. Y. 1876); Chase v. Peck, 21 N. Y. 581 (1860); Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 (1894); Bogart v. Bliss, 148 N. Y. 194, 42 N. E. 582 (1896); Sleeth v. Sampson, 237 N. Y. 69, 142 N. E. 355 (1923). The latter case decides that as no additional money was actually advanced when the parol agreement was made to give a mortgage to cover past indebtedness and also a proposed additional loan, no equitable mortgage arose. If a loan had been made relying on a promise to give such a mortgage, or even on an agreement that the property in question should be regarded as security for the loan, an equitable mortgage would have arisen to the extent of the additional loan. The equity arises out of the advancing of the loan on the strength of the agreement that the lender should have the security. See Chase v. Peck, *supra*. Cases of part performance of parol contracts for the sale of land, discussed in the first part of the opinion, involve a different question altogether.

31 Conway v. Alexander, 7 Cranch 218 (U. S. 1812); Russell v. Southard, 12 How. 139 (U. S. 1851); Horn v. Keteltas, 46 N. Y. 605 (1871); Sweet v. Parker, 22 N. J. Eq. 453 (1871).

32 Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163 (1900). Here the equity was enforced against the estate of the deceased mortgagee to an amount equal to the value of the land over and above the mortgage debt. The land could not be reached because it had been conveyed to an innocent purchaser.

the action be purely an action at law according to practice prior to the Code.[33]

We may summarize on the merger of law and equity as follows:—Merger prior to or apart from conscious and formal merger by the Codes has taken place *pro tanto* in all situations in which the law has voluntarily adopted and accepted a rule or principle which was created and established in equity as a correction or reform of existing law in the interests of justice based upon "reason and conscience." In every such case the rule or principle becomes concurrently legal and equitable, so that in the separate administration of law and equity prior to the Codes in code states, and today in non-code states, the same result would be reached in all such cases, whether raised in a court of law or a court of equity. The more important classes of cases of this kind, with special emphasis on mortgages, are discussed in the preceding paragraphs.

The Codes in the United States and the Judicature Acts in England have brought law and equity together, not only as parts of a single system of state law, but also in their administration, by uniting and merging courts of law and equity into a single court of both law and equity, and by providing that every question, legal and equitable, arising in any controversy, may be settled in a single action. The same judges necessarily act in all cases, whether the action be called legal or equitable. The difficulty has been in accepting the single code action, the "civil action," as both legal and equitable, and in applying to this situation the constitutional mandate of jury trial of issues triable by jury at law at the time the constitutions were adopted. These difficulties disappear if the real purpose and accomplishment of code merger is understood and applied, viz., to bring law and equity together as a single system enforced by a single action in a single court, without change of substantive law and equity, and without change of the methods of trial, preserving jury trial of issues of fact so triable under the constitutional mandate, but with full recognition of the power of the court to control the trial and to award relief so that complete justice may be given in a single action. We have considered the practical

[33] Chase v. Peck, note 30, *supra;* Sprague v. Cochran, note 30, *supra;* Kent v. Agard, 24 Wis. 378 (1869); Dobbs v. Kellogg, 53 Wis. 448, 10 N. W. 623 (1881); 3 Tiffany, Real Prop. (2d Ed.), § 605, e.

operation of code merger in three groups of cases, (1) equitable defenses to law actions; (2) legal and equitable relief in the same action, or legal relief given in an action seeking equitable relief, or *vice versa;* and (3) the practical operation of the constitutional mandate of jury trial in both classes of cases above referred to. Under the cases there can be no doubt that code merger actually accomplishes the great reform that was intended, by an overwhelming weight of authority. The recent reactionary decisions of the lower courts in New York are based on some unfortunate *dicta* of the Court of Appeals, but they are offset in considerable measure by liberal decisions of equal authority which lay down the true doctrine of merger as established by a long line of decisions of the Court of Appeals. In other code states there is very little judicial question of the practical accomplishment of code merger. In the federal courts and in most of the non-code states statutes providing for equitable defenses in law actions and for easy transfer of actions brought in the wrong court have gone a long way to accomplish the benefits resulting from complete merger.

It would seem, therefore, that the subject of equity as a study should be approached from the point of view of the merged system, which prevails today almost universally. We get a false point of view if we approach a modern problem in equity from the standpoint of a lawyer of the sixteenth century, treating equity as a thing apart, to be sought as a kind of last resort when relief at law fails. Equitable relief and legal relief exist side by side, to be had in the same shop if not on the same counter. Our judges are bound to give the relief which justice demands, legal, equitable or both, on the facts as established on the trial within the pleadings, original or amended. Modern development of equity is the growth of specific relief at the expense of damages. With both forms readily available there is no good reason why we should not have the best. The superiority of specific relief, which does exact justice giving to each party exactly what he is entitled to, over damages which is a substitution of something else, is apparent throughout the field of equity's action. The recognition of the merger of law and equity as a single system ought to extend the field of specific relief, and must necessarily end the recognition of supposed legal rules which are in conflict with prevailing equitable doctrines.

PART II

EQUITABLE RELIEF IN TORT CASES

CHAPTER V

EQUITABLE RELIEF AGAINST WASTE

§ 25. Inadequacy of Damages or Other Legal Remedy. Historically there is no doubt that equity intervened to protect legal rights only in cases where the remedy at law was inadequate. This was true in the earliest cases.[1] It has continued to be true down to the present. In the fifteenth century, the period in which the jurisdiction of equity was established along the lines of its later development, Chancery intervened freely to enforce contractual rights where the common law actions of debt or covenant would not lie,[2] but abandoned this field when in the following century the law gave adequate relief in parol contract cases by means of the new action of assumpsit.[3] Where damages was an inadequate remedy, however, "reason and conscience" demanding that the contract be specifically enforced, Chancery retained jurisdiction and gave specific relief by compelling specific performance of contracts for the sale of land and for the sale of chattels of unique value.[4] For the same reason Chancery compelled the return of chattels of unique value by personal decree against wrongful takers, as the remedy at law for a money equivalent was inadequate.[5] Inadequacy of the legal remedy was the basis of Chancery's earliest interventions in the field of torts.[6] In tracing the development of equity his-

[1] See references to Barbour and Holdsworth in notes following.

[2] Barbour, 4 Oxford Studies Legal Hist. 57, 100–107; 150–168; 5 Holdsworth, Hist. Eng. Law, 294–298. See § 4, *ante*.

[3] 5 Holdsworth, *ibid.* 322.

[4] Barbour, *op. cit.* 116, 120; 5 Holdsworth, *op. cit.* 287, 288.

[5] 5 Holdsworth, Hist. Eng. Law, 287; Barbour, *op. cit.* 110–113.

[6] 5 Holdsworth, *op. cit.* 287–288, citing Anonymous, Moore 554, pl. 748, 72 Eng. Rep. 754, Select Cas. Ch. (S. S.) 20, 21 (1599), reported 1 Ames, Cas. Eq. 467, Egerton saying he had seen a precedent going back to the reign of Rich-

torically we have seen that not only in the classes of cases above referred to, but also in cases of equitable intervention to grant relief because of fraud, duress and mistake, as well as to relieve from penalties, and to give effect to assignments of choses in action, relief was given because relief at law was either entirely lacking or was inadequate.[7]

Lack or inadequacy of relief at law has, therefore, been the basis on which equity has always acted. If the law gives adequate relief in any case, equity refuses to interfere, and in the early cases of parol contracts above referred to, equity surrendered jurisdiction voluntarily after the law developed an adequate remedy in assumpsit.

The difficulty is in determining whether or not the relief given at law in any case is "adequate." This term is exceedingly indefinite. Its meaning in this connection can be arrived at only by examining the different classes of cases in which equity has intervened. In tort and contract cases the law gives damages, equity gives specific relief, and the question to be determined in all such cases is this: From the standpoint of reason and justice, is damages an adequate remedy in the given case? If the remedy of damages is adequate equity refuses to grant specific relief; if damages is not an adequate remedy in any such case equity intervenes to grant specific relief because reason and justice require it. We shall see that the growth of modern equity has been in the direction of granting specific relief more freely. If specific relief is definitely superior to damages and as a practical matter may be readily enforced, the modern tendency is to grant it instead of damages. The merger of law and equity under codes and statutes in England and quite generally throughout the United States has brought law and equity together in a single unified system of law administered by a single court, or as a largely unified system administered separately.[8] This necessarily changes the historical attitude of equity, based on its origin, of intervention by royal prerogative in extraordinary cases, and developing as a system supplementing and cor-

ard II for an injunction against waste by a tenant for life because there was no remedy at law as a second life estate intervened between the defendant and the remainderman in fee. See Kane v. Vanderburgh, 1 Johns. Ch. 11 (N. Y. 1814).

7 See § 4, *ante*.

8 See Ch. IV, *ante*.

recting the prevailing law, to be resorted to only in unusual cases of real need, with all the jealousy, hostility and competition which this relation of the two systems necessarily involved. Now that all this is ended, and law and equity are quite definitely united as together constituting a single system of law administered in the great majority of the states by a single court, there is no reason why specific relief should not be given whenever it will be more effective to do justice between the parties. The tendency to grant specific relief more freely is still exercised, however, according to the ancient formula. The remedy at law, damages, must be inadequate. But there is a strong tendency to hold damages inadequate in a steadily increasing number of cases. This development must constantly be borne in mind in considering the modern cases of equitable or specific relief in actions of tort and contract, which will constitute the subject matter of this and the following chapters of this book.

Specific relief in tort cases takes the form of an injunction to prevent the threatened tort and in that way to secure to the plaintiff the specific enjoyment of his right. In some cases the injunction is mandatory, requiring affirmative acts to end a continuing trespass or nuisance. At law his only remedy is damages after the tort has been committed. If damages is an adequate remedy, in the sense that the injury done is adequately repaired so that the plaintiff is substantially put back into the position he occupied before the tort was committed, equity will not intervene. If for any reason damages will be inadequate in that they cannot or may not substantially repair the wrong, equity will intervene to prevent the threatened wrong by injunction. The balance of the chapter and the chapters which follow will treat of equity's intervention in connection with the principal specific torts in which equitable relief by injunction has been sought.

§ 26. Waste. Prior to the latter half of the thirteenth century an action for waste could be maintained only against tenants in dower and curtesy and guardians of infant heirs of deceased tenants in knight service, though if other kinds of tenants for life committed waste after being restrained from so doing by a writ of prohibition, the action of waste would lie

against them.[9] In the latter half of the thirteenth century the writ of waste was provided for by statute against acts of waste committed by all tenants for life and for years.[10] For purely technical reasons the remainderman or reversioner in fee could not maintain this writ against the tenant in possession if a second life estate intervened, and the second life tenant had no remedy at law in such cases because the action of waste could be brought only by the owner of the immediate estate of inheritance.[11] We have seen that one of the important instances of equitable relief given by the King's Court in the thirteenth century was by restraining acts of waste on the part of tenants for life and for years by the writ of prohibition above referred to, and also by the writ of *estrepment* granted during the pendency of a real action and operating very like the modern injunction *pendente lite*.[12] Chancery for the first time intervened to restrain threatened acts of waste by injunction in the fifteenth century in the cases above referred to, in which the reversioner or remainderman in fee had no remedy at law because of the technical difficulty created by the intervening life estate.[13]

9 Walsh, History of English and American Law, 184, citing 2 Blackstone, 281; Coke, Littleton, 53; 2 Pollock & Maitland, History of English Law, 9, citing Bracton, Note Book pl. 433, 540, 607, 1304, 1371; Bracton, 315. That waste would lie against life tenants before the Statute of Gloucester, though no royal prohibition had issued against them, see Kirchwey, Liability for Waste (1908), 8 Col. L. Rev. 428, 429.

10 Walsh, Hist. Eng. & Am. Law, 185, referring to the Provisions of Westminster (1259), the State of Marlborough, 52 Hen. III, c. 23 (1267); and the Statute of Gloucester, 6 Edw. I, c. 5 (1278).

11 Walsh, Property (2d Ed.), 80, citing Coke, Littleton 53a; Kane v. Vanderburgh, 1 Johns. Ch. 11 (N. Y. 1814). See cases cited, 1 Ames, Cas. Eq. 467. See, however, cases referred to by Prof. Kirchwey, discussed note 13, *post*.

12 See § 2, note 20, *ante*.

13 See *supra* note 6; Ames, Cas. Eq. 467, cases cited, note 1, and *ibid.* 468, n. 1. Professor Kirchwey in his article, Liability for Waste (1908), 8 Col. L. Rev. 624 at 629, 630, gives an account of the origin of the action of case for waste. In Jeremy v. Lowgar, Cro. Eliz. 461, 78 Eng. Rep. 714 (1596), case by a life tenant against a tenant for years for waste was allowed. In 1683 two judges held that the reversioner in fee could maintain case against the tenant for waste, two holding to the contrary. Prof. Kirchwey adds:—"But the doubt was soon resolved in favor of the action and during the following century the cases are so numerous that before its end Serjeant Williams is able to declare that 'case has now become the usual action for . . . waste,' citing note to Green v. Cole, 2 Wms. Saund.

Probably the Chancellor acted in these cases because of the total absence of a legal remedy, not because of the inadequacy of damages as a remedy. As the reversioner or remainderman in fee may sue the first life tenant for such acts of waste, after the second life tenant's death,[14] it is clear that legal waste is involved, the technical difficulty barring the action at law being removed by the second life tenant's death. At law a contingent remainderman could not sue the tenant for waste because he had only a possibility of an estate, not an actual fee in remainder.[15] Equity, however, intervened to protect the contingent remainderman as in the other cases above referred to, because of the absence of a remedy at law.[16] In these cases the vested remainderman or reversioner, holding the fee subject to the taking effect of the contingent remainder, had his action at law for waste. Therefore legal waste is involved in these cases also, equity protecting the contingent remainderman in direct conflict with the rule at law.

Equity intervened to restrain legal waste where the inadequacy of damages was the only reason therefor at a comparatively late date.[17] But since that time the jurisdiction of equity to grant specific relief by way of injunction in these cases has become established in England and throughout the United States as the rule everywhere prevailing. Waste at law necessarily

252e, 85 Eng. Rep. 1037 (1671). Serg. Williams, *ibid.* 252, a, states that case will lie in favor of a remainderman for life, or a remainderman in fee where a life estate intervenes, against the tenant in possession for acts of waste. The cases above cited by Prof. Kirchwey tend to support this statement. But the remedy in equity by injunction antedated by over a century the introduction of case for waste where the writ of waste would not lie, another instance of the law following the lead of equity in correcting the law.

14 Co. Litt. 54a; Paget's Case, 5 Co. 76b, 77 Eng. Rep. 170 (1593) and other cases cited Ames, Cas. Eq. 467, n. 1, 3rd paragraph.

15 Walsh, Property (2nd Ed.), 80, n. 1 e, citing Watson v. Wolff-Goldman R. Co., 95 Ark. 18, 128 S. W. 581 (1910), 1 Cook, Cas. Eq. 479; Hunt v. Hall, 37 Me. 363 (1853); Latham v. Roanoke &c. Co., 139 N. C. 9, 51 S. E. 790 (1905). See, also, Taylor v. Adams, 93 Mo. App. 277 (1902), Clark, Cas. Eq. 758.

16 Lutterel's Case, cited in Hale v. Hale, Prec. Ch. 50, 24 Eng. Rep. 25 (1692), 1 Ames, Cas. Eq. 468. See also cases in preceding note.

17 Professor Ames said that Horner v. Popham, Colles 1, 8, 1 Eng. Rep. 150 (1697), is the earliest reported case of this kind. 1 Ames, Cas. Eq. 461, n. 1. See also Chafee, Cases on Equitable Relief against Torts. 9 n.

involves permanent injury to land committed by the tenant. If it is not permanent injury it is not waste.[18] Therefore the damage is irreparable in that the reversioner or remainderman is being deprived *pro tanto* of his land. Just as in cases of specific performance of contract for the sale of land, damages is an inadequate remedy because of the unique quality of a parcel of land, so in cases of waste necessarily involving permanent depreciation of the value of the land, damages must also be inadequate. The owner of the fee is entitled to the specific thing, the land, rather than a money equivalent, since there can be no assurance that the equivalent in money damages would enable him to restore the property to its former condition. It follows, therefore, that if the threatened act will amount to legal waste equity will intervene by injunction. The cutting of trees by a tenant except for use as fire wood on the premises or for necessary repairs is legal waste and will be restrained by injunction.[19] Destruction or removal of buildings or fixtures by such tenants is legal waste, and therefor will be enjoined.[20] So, also, waste by

18 See Walsh, Property (2d Ed.), 76; 2 Bl. Com. 281.

19 For a detailed account of legal waste in the cutting of trees and timber see Walsh, Property (2d Ed.), 80–82. A few of the leading cases in which tenants for years or for life have been restrained from cutting timber follow:—Whitfield v. Bewit, 2 P. Wms. 240, 24 Eng. Rep. 714 (1724); Smith v. Smith, 105 Ga. 106, 31 S. E. 135 (1898); Robertson v. Meadors, 73 Ind. 43 (1880); Ware v. Ware, 6 N. J. Eq. 117 (1847); Kane v. Vanderburgh, 1 Johns. Ch. 455 (N. Y. 1814); Sarles v. Sarles, 3 Sandf. Ch. 601 (N. Y. 1846). See 1 Ames, Cas. Eq. 461 n.

Since the cutting of trees to clear and develop the land for cultivation in undeveloped and unsettled parts of the country is not legal waste, it follows that no injunction will be made in such cases. Walsh, Property (2d Ed.), 81, 82, notes 12 and 13. See Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527 (1884), the court refusing the injunction sought because the life tenant was clearing woodland for pasture, improving the property. This and other cases cited therein sustain the tenant's right to cut and sell timber in clearing up land in new or comparatively new developments, provided enough timber is left for the permanent use of the farm.

20 Smyth v. Carter, 18 Beav. 78; 52 Eng. Rep. 31 (1853); Poertner v. Russel, 33 Wis. 193 (1873), 1 Cook, Cas. Eq. 469; Jungerman v. Bovee, 19 Cal. 354 (1861); Fortescue v. Bowler, 55 N. J. Eq. 741, 38 Atl. 445 (1897). In Brigham v. Overstreet, 128 Ga. 447, 57 S. E. 484 (1907), the court said in a similar case: "Injunctions have been held to be proper to stay waste, regardless of the question as to whether the damages would be

opening new mines will be restrained in equity, but not the working of mines already opened, or the making of new openings to work an old vein.[21]

On the other hand equity leaves the plaintiff to his legal remedy, and refuses an injunction, where the damages are trivial or where the land is increased in value by improvements made by the tenant.[22] There is no waste at law if the damages are nominal, and so-called "ameliorating" waste of the common law is not waste at all in the United States.[23] Nevertheless it is waste for a tenant to alter a building or other improvement in a radical way, so that the character of the property is seriously changed. The landlord or remainderman has a right to have the property restored to him substantially unchanged in character beyond changes expressly authorized or reasonably incident to the estate of the tenant, and equity will enjoin such a change or compel restoration.[24] However, the reserved power

irreparable, while as to cases involving mere trespass it has been otherwise."

In Shipley v. Ritter, 7 Md. 408 (1855), a case of trespass in the nature of waste, the court said: "The jurisdiction of equity does not depend on the worth of the trees, merely as wood or timber, but on their location as part of an estate, rendering it more valuable by reason of the uses to which they are or may be devoted . . . There is something to be regarded beyond the mere pecuniary value of the trees." It is the specific right to the land, as a unique thing, and to every part of it of importance, which makes damages inadequate in these cases.

21 Clavering v. Clavering, 2 P. Wms. 388, 24 Eng. Rep. 780 (1726); Gaines v. Green Pond Iron Mining Co., 33 N. J. Eq. 603 (1881). As to legal waste in cases of mines see Walsh, Property (2d Ed.), 83, 84. That a tenant for life or for years cannot open new gas or oil wells, or lease the land for such purpose, unless that right is expressly given, see Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201 (1897); Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. Supp. 287 (1914), [holding that inchoate dower of the plaintiff did not give her a right to enjoin her husband's grantee from operating oil and gas wells].

22 Doherty v. Allman, 3 App. Cas. 709 (1878). See note following.

23 Pynchon v. Sterns, 52 Mass. 304 (1846); Clark v. Holden, 73 Mass. 8 (1856); Clemence v. Steere, 1 R. I. 272 (1850); Proffitt v. Henderson, 29 Mo. 325 (1859). That judgment must be for the defendant if the jury finds only nominal damages, see Walsh, Prop. (2d Ed.) 76, n. 1, citing Co. Litt. 95a; Harrow School v. Alderton, 2 Bos. & P. 86, 126 Eng. Rep. 1170 (1800); Sheppard v. Sheppard, 3 N. C. 382 (1806).

24 Smyth v. Carter, 18 Beav. 78, 52 Eng. Rep. 31 (1853); Brock v. Dole, 66 Wis. 142 (1886), [tenant from year to year of a room in a frame building enjoined from erect-

of equity to withhold relief in any particular case as a matter of judicial discretion if justice demands it, will be exercised in such cases if the property has been really improved in value by the change which is reasonable and expedient and the objections of the reversioner are unreasonable.[25]

The supposed difficulty of supervision in enforcing affirmative duties is the explanation of the refusal of equity in England to restrain permissive waste necessarily involving mandatory decrees to make repairs.[26] Though it is generally asserted that

ing a chimney in the building]; Klie v. Van Broock, 56 N. J. Eq. 18, 37 Atl. 469 (1897), [containing a valuable analysis of the problem and the cases]; Agate v. Lowenbein, 57 N. Y. 604 (1874); Thacher v. Phinney, 89 Mass. 146 (1863); Davenport v. Magoon, 13 Ore. 3, 4 Pac. 299 (1884); Williams v. Chicago Exhib. Co., 188 Ill. 19, 58 N. E. 611 (1900).

25 Doherty v. Allman, 3 App. Cas. 709 (1878); Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N. W. 738 (1899), [holding it was not waste for a life tenant to remove a house and grade the plot for use for business purposes, the house having become valueless because of changes in the neighborhood, and the alteration substantially enhancing the value of the property]; Sherill v. Connor, 107 N. C. 630, 12 S. E. 588 (1890); Beers v. St. John, 16 Conn. 322 (1844); Jackson v. Andrews, 18 Johns. 431 (N. Y. 1821). Pitney, V. C., in Klie v. Van Broock, 56 N. J. Eq. 18, 37 Atl. 469 (1897), discussed admirably the cases in which alterations will be allowed because coming within the implied terms of the lease under special circumstances. In several cases the length of the term was a controlling consideration.

26 Lord Castleman v. Lord Craven, 22 Viner's Abr. 523 (1733), pl. 11; 1 Ames, Cas. Eq. 466, n. 1, citing Wood v. Gaynon, Ambl. 395, 27 Eng. Rep. 263 (1761); In re Cartwright, 41 Ch. Div. 532 (1889). Prof. Kirchwey in his article, Liability for Waste (1908), 8 Col. L. Rev. 425, at 435, cites several cases of prohibitions against permissive waste which appear in Bracton, Note Book, nos. 739, 1165 and 1617. In the case of Royesia de la Dene, Br. N. B. 1165, a mandatory injunction issued requiring the tenant to restore a kitchen which was burned, two farm buildings which had collapsed, and to repair all other buildings on the premises. General prohibitions against further waste issued in these cases. No distinction was made in the early law between waste by affirmative voluntary act, by act of a stranger, by negligence in guarding the premises against fire, tempest or the sea, and by mere failure to make necessary repairs. The Statute of Gloucester created a new action, the writ of waste applying to all these different forms of waste as they existed at common law. The action on the case in the nature of waste was first used in the cases where the writ of waste would not lie because of the narrow limits given that action by the Statute of Gloucester. Jeremy v. Lowgar, Cro. Eliz. 461, 78 Eng. Rep. 714 (1596), referred

the American doctrine is the same, there is considerable au-

to in note 13, *supra,* where the development of case in the nature of waste, until it became concurrent with the writ of waste and finally superseded it, is explained. This development closely parallels the development of assumpsit at law after equity had intervened to enforce parol contracts where debt or covenant would not lie. The law was forced by the competition of equity to grant relief, and did it by means of case which finally developed into assumpsit. So here, equity led the way by restraining waste in favor of remaindermen not protected by the Statute of Gloucester. The law finally used case as the means by which legal relief might be given to such remaindermen. By this time or shortly thereafter (see note 17, *ante*), equity was enjoining voluntary waste in all cases because of the inadequacy of damages. That the modern English cases holding that a life tenant cannot be held for permissive waste are wrong, as the old writ of waste was used freely for centuries in such cases, and the action on the case which superseded it may be used in any case where the old writ was formerly used, see Kirchwey, *loc. cit.* (1908) 8 Col. L. Rev. 624 at 635; Walsh, Property (2d Ed.), 79, cases cited, note 9. Later cases in England establish the liability of a tenant for years for permissive waste [Yellowly v. Gower, 11 Ex. 274, 156 Eng. Rep. 833 (1855); Davies v. Davies, 38 Ch. Div. 499 (1888)] and as the same principle is involved, these cases should be regarded as establishing the law though *contra* to In re Cartwright, 41 Ch. Div. 532 (1889), the leading case holding that a life tenant or his representative is not liable for permissive waste, as that case is based on no controlling reason, but rather on the absence of precedents to the contrary involving permissive waste by life tenants.

It is submitted that it is a mistake to regard destruction by the voluntary act of strangers and by the negligence of tenants as permissive waste. Just as the bailee was liable to the bailor for wrongful destruction of the goods without fault of the bailee because the bailor had no action against the wrongdoer when trespass was the only remedy, so also the landlord was given a remedy against the tenant for destruction by strangers, as the tenant alone could sue the wrongdoer in trespass. The subsequent development of case for injury to the reversion removed all reason for this liability, but it has continued to the present day, though by weight of authority it is probably no longer law in many states. See Rogers v. Atl. Gulf & Pac. Co., 213 N. Y. 246, 107 N. E. 661 (1915); Walsh, Property (2d Ed.), 77, n. 2. See, however, Coale v. Hannibal &c. R. Co., 60 Mo. 227 (1875), holding that a tenant, presumably a tenant at will, was not liable to the landlord for destruction by strangers, and therefore, could not recover from the stranger, citing Harnett v. Maitland, 16 M. & W. 256, 153 Eng. Rep. 1184 (1847). That case involved nonrepair only, and therefore the Coale case assumed without discussion or authority that destruction by a stranger was permissive waste. See Campbell v. Arnold, 1 Johns. 511 (N. Y. 1806), the court holding that the landlord in such case could

thority in the American cases[27] for equitable relief against permissive waste.[28] We shall see later, in connection with specific performance of contracts, that in recent years equity has not hesitated in many cases to require the doing of affirmative acts where justice to the plaintiff required such action, and the supposed difficulties have been found to be largely imaginary.[29] Possibly this broadening of specific relief may be extended eventually to include cases of permissive waste as the prevailing rule.

Equity has not hesitated to enjoin waste in the form of improper methods of tillage, the sale of manure, of hay, and other acts of bad husbandry on the part of tenants of farms.[30]

not hold the stranger in trespass, but (*dicta*) he might hold him in the action of case, and he might also hold the tenant at will. That burning or other destruction through the negligence of the tenant is voluntary, not permissive waste, so that a tenant at will may be held therefor, see Walsh, Property (2d Ed.), 88. See, however, Prof. Kirchwey's valuable and arresting treatment of the development of permissive waste in the article in (1908) 8 Col. L. Rev. 624, above cited, in which he treats permissive waste as including both situations above referred to.

27 Kirchwey, Liability for Waste (1908), 8 Col. L. Rev. 624, at 634; Clark, Equity 235, 236.

28 In Kentucky the statute covers voluntary waste, and the court construes legislation on the subject as eliminating the action of case for waste, leaving permissive waste to be redressed only in equity. Smith v. Mattingly, 96 Ky. 228, 28 S. W. 503 (1894); Prescott v. Grimes, 143 Ky. 191, 136 S. W. 206 (1911). In Sawyer v. Adams, 140 App. Div. 756, 126 N. Y. Supp. 128 (1910), the court dismissed an application to appoint a receiver in order that repairs might be made by the defendant, a life tenant, stating that a mandatory injunction requiring the tenant to make repairs was the proper remedy, a *dictum*. But in St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 67 N. W. 657 (1896), a receiver was appointed to pay taxes and make repairs, as against the life tenant, guilty of permissive waste, the court declaring it a clear case for equitable intervention. In Gleason v. Gleason, 43 Ind. App. 426, 87 N. E. 689 (1909), though the court refused a mandatory injunction for repairs it did so because the plaintiff failed to show inadequacy of the legal remedy, not because of difficulty of superintendence, or because permissive waste was involved. See early cases, Bracton's Note Book, cited in note 26, *supra*, in which prohibition against permissive waste was granted at law in the thirteenth century. See also English cases cited as *contra* to the prevailing rule, Chafee, Cas. Eq. Relief Agst. Torts, 15, n. 2.

29 See § 65, *post*.

30 Drury v. Molins, 6 Ves. 328, 31 Eng. Rep. 1076 (1801); Pratt v. Brett, 2 Madd. 62, 56 Eng. Rep. 258

In all cases of legal waste in which equity intervenes by injunction, damages by way of an accounting for the waste committed up to the time the injunction takes effect will be awarded at the same time in order that complete relief may be given in a single action and another suit at law may not be required.[31] But if it develops on the trial that the plaintiff is not entitled to equitable relief in any form, equity will not retain the case to award damages. The plaintiff will be left to his remedy at law.[32] In code states in which law and equity have been merged in a single system as well as in England under the Judicature Acts, it is the duty of the court to award damages in such cases since it is a court of law as well as of equity, provided the pleadings and proof established a right thereto, whether relief in equity is given or not.[33]

§ 27. Equitable Waste. A tenant for life or for years "without impeachment of waste" by express provision of the instrument creating the estate, was not subject to any liability at law for cutting timber or other act of destruction, since this express provision negatived any such liability.[34] The practice of creating life estates and tenancies for years with this proviso seems to have developed to considerable proportions in England, and equity intervened at an early date to restrain such tenants from acts of unconscionable destruction such as cutting *all* the timber on the land, cutting ornamental timber, and wanton destruction of buildings or other improvements.[35] Equity inter-

(1817); Sarles v. Sarles, 3 Sandf. Ch. 601 (N. Y. 1846); Wilds v. Layton, 1 Del. Ch. 226 (1822); Chapel v. Hull, 60 Mich. 167, 26 N. W. 874 (1886).

31 Jesus College v. Bloom, Ambl., 54, 27 Eng. Rep. 31 (1745); Parrott v. Palmer, 3 M. & K. 632, 40 Eng. Rep. 241 (1834).

32 See previous note, also Lippincott v. Barton, 42 N. J. Eq. 272, 10 Atl. 884 (1886).

33 See Ch. IV, *ante*.

34 Bowles' Case, 11 Co. 79, 77 Eng. Rep. 1252 (1616).

35 Bishop of Winchester's Case, 1 Roll. Abr. 380, Ames, Cas. Eq. 469, cited in Abraham v. Bubb, 2 Freem. Ch. 54, at 55, 22 Eng. Rep. 1054, at 1055 (1680), [restraining the threatened cutting of all the timber, "because it is against the public good to destroy the trees . . ."]; Vane v. Lord Barnard, 2 Vern. 738, 23 Eng. Rep. 1082 (1716); Packington's Case, 3 Atk. 215, 26 Eng. Rep. 925 (1744), 1 Cook, Cas. Eq. 482 (trees growing naturally as well as those planted will be protected if they are for ornament or a shelter to the dwelling); Micklethwait v. Micklethwait,

vened because the law gave no relief, and reason and conscience required that such acts be restrained as unconscionable wrongs to the remainderman or reversioner not justified by any reasonable exercise of the power expressly given by the clause "without impeachment of waste."[36] The cutting and sale of ordinary timber, opening and working mines, and any act which could be justified as a reasonable exercise of the powers of an owner in fee, were not restrained. Later equity restrained a tenant in tail after possibility of issue extinct for like reasons, such a tenant having in practical effect a life estate, though as a tenant in fee he was dispunishable at law for waste.[37]

The modern cases have extended the doctrine to the case of a fee upon a fee; the first owner in fee takes free of legal waste in any form because he has an estate in fee, but in equity he will be restrained from doing anything that "a prudent man would not do in the management of his own property."[38] In this

1 De G. & J. 504, 44 Eng. Rep. 818 (1857), [The court said that equity intervened "upon this ground, that it will not permit an unconscientious use to be made of a legal power . . . It cannot be presumed that he (a devisor or settlor) meant it to be denuded of that ornament which he has himself enjoyed"]; Downshire v. Sandys, 6 Ves. 107, 31 Eng. Rep. 962 (1801), [Lord Eldon saying: ". . . Yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed."] See additional English cases cited, 1 Ames, Cas. Eq. 469, n. 2; Chafee, Cas. Eq. Relief Agst. Torts, 19–21.

There can be no doubt that equity intervenes in these cases because the act is unconscionable as an injury to the reversioner or remainderman not justified by a normal exercise of the legal power. The expressed intent of the testator or settler, referred to in the two last cases quoted from above, is clearly opposed to any interference with the tenant. See Clark, Equity, 239, 240. It is clear that equity intervenes irrespective of such intent. See note 40, *post*. There are not many American cases of this kind, as limitations "without impeachment of waste" are rare. See Clement v. Wheeler, 25 N. H. 361 (1852); Stevens v. Rose, 69 Mich. 259, 37 N. W. 205 (1888). Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004 (1890), Clark, Cas. Eq. 768 (express provision that the tenant is to have full control as though owner in fee); Cundiff v. Shackelford, 150 Ky. 579, 150 S. W. 670 (1912).

36 See note immediately preceding.

37 Williams v. Day, 2 Cas. Ch. 32, 22 Eng. Rep. 832 (1680), 1 Ames, Cas. Eq. 476. See additional English cases cited Ames, *ibid.* 476, note 1.

38 Turner v. Wright, 2 De G. F. & J. 234, 45 Eng. Rep. 612 (1860),

case, as in several of the earlier cases referred to above,[39] the court justifies its interference with unconscionable acts of destruction by the first taker in fee by arguing that such destruction would be contrary to the intent of the devisor. It is obvious, however, that the court did not in the slightest degree consider the possibility of holding that the will should be construed at law as creating an estate in fee subject to any such limitation upon the power of the devisee. Admittedly he took a fee free from any liability for legal waste. Reason and conscience required that he should not be permitted to maliciously or unreasonably destroy the property to the prejudice of the next possible taker in fee. Therefore in the cases of tenants "without impeachment for waste," Professor Langdell's argument that equity restrains *legal* waste in these cases, construing the clause as excluding the power to commit acts of unconscionable destruction, while the law construes the clause otherwise, must be rejected.[40]

1 Ames, Cas. Eq. 476; 1 Walsh, Cas. Prop., 187. This case gives a clear test of equitable waste: "But equitable waste is that which a prudent man would not do in the management of his own property. . . . I think that the rights and liabilities of tenant for life *sans* waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over."

The American cases are generally in accord with Turner v. Wright, *supra*. See Gannon v. Peterson, 193 Ill. 372, 62 N. E. 210 (1901); Farabow v. Green, 108 N. C. 339, 12 S. E. 1003 (1891); Wallington v. Taylor, 1 N. J. Eq. 314 (1831); Landers v. Landers, 151 Ky. 206, 151 S. W. 386 (1912).

39 See cases referred to *supra*, note 35.

40 For Prof. Langdell's theory see his Brief Survey of Equity Jurisdiction (2d Ed.) 4. In Gage v. Piggott, 53 Ir. L. T. R. 33, 39 (1918), Chafee, Cas. Eq. Relief Agst. Torts, 21, O'Connor, L. J., said: "It was felt, even in the earliest days, that a power of this kind, unlimited as it was, and liable to gross abuse, was not according to the real intention of the instrument creating the estate. It was, indeed, obviously repugnant to the intention of the grantor, who, in carving out the life estate and the other estates in remainder might be presumed to be as much concerned for the preservation of the inheritance for the remainderman as for the limited enjoyment of it by the life tenant. Accordingly the courts of equity proceeded to give the grants . . . a construction more consonant with the real intentions of the grantor."

This statement, the strongest of several statements quoted in Chafee's Cases, *supra*, in support of Prof. Langdell's theory, in no way changes the fact that the clause in question as construed by the law

Another form of equitable waste involving no legal tort of any kind, is waste by a mortgagor in possession. In common law as well as in lien states he is, in equity, the owner of the property in fee. His relation to the land as tenant at will under the ancient common law is so completely a thing of the past that it has become nonexistent even as a pretense so far as legal liability for waste is concerned. As owner in fee the mortgagor can commit no waste in the legal sense. But if he threatens or starts to cut and sell timber, remove buildings or other improvements or in any other way to permanently reduce the value of the property to such an extent as to impair the security of the mortgagee, equity will act to protect the mortgagee's right of security by injunction.[41] Impairment of security is determined

courts, determines the existence or non-existence of legal waste in these cases. Admittedly in equity there is no legal waste involved. This is the basis of every decision on this question. Equity is not giving effect to the expressed intent of the testator or donor. Speculations as to his actual intent, like those above referred to, help to throw light upon the question, Does reason and conscience require that acts amounting to so-called equitable waste be restrained? In all of these cases, in spite of the rule at law which permitted such acts by tenants in fee tail after possibility, tenants in fee simple subject to a conditional limitation over to another, as well as tenants for life or for years without impeachment of waste, reason and conscience required that equity should give relief. This changed the prevailing law, in the sense of law and equity combined. In these cases acts which are not torts at law become torts in equity.

In code states combining law and equity, as explained in Chapter IV, *ante*, legal and equitable waste are brought together as part of the merged law, with full power in the court to determine whether an injunction or damages or both shall be given. This necessarily eliminates the old rules at law in conflict with the rules in equity applying to the different cases of equitable waste, so that under the merged law unconscionable destruction by each of the different classes above referred to is waste subject to relief by injunction and damages.

41 Fairbank v. Cudworth, 33 Wis. 358 (1873), 1 Cook, Cas. Eq. 474; King v. Smith, 2 Hare 239, 67 Eng. Rep. 99 (1843), ["The difficulty, I feel, is in discovering what is meant by a 'sufficient security.' Suppose the mortgage debt, with all the expenses, to be £1000, and the property to be worth £1000—that is, in one sense, a sufficient security; but no mortgagee who is well advised would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage."]; Brady v. Waldron, 2 Johns. Ch. 148 (N. Y. 1816); Emmons v. Hinderer, 24 N. J. Eq. 39 (1873). See, 2 Walsh, Cas. Prop.

by inquiring whether the value of the premises will be so reduced that the usual margin of value of the mortgaged property over the amount of the mortgage debt which business men insist on, generally at least one-third of the value of the premises, has been materially reduced so that from the standpoint of sound finance the security has become inadequate.[42]

Waste between joint tenants or tenants in common is legal waste, since an action is given therefor by the Statute of Westminster II.[43] The Statute, however, did not define waste between co-tenants. The better opinion is that co-tenants in fee are not guilty of waste in using and enjoying the property in any way which is in accord with the reasonable exercise of prudent ownership by the average man.[44] This is the test of equitable waste, as it happens, but equity has nothing to do with the determination of this question. It is entirely a question at law. Of course equity will restrain threatened waste as between co-tenants as in other cases of legal waste, because damages is an inadequate remedy.[45]

1173-1179. See long list of cases, 1 Ames, Cas. Eq. 483.

The same principle applies in any case of threatened impairment of security in land. The holder of the security will be protected whether it be by way of mortgage or in any other form. 1 Ames, Cas. Eq. 483, n.

42 See cases in preceding note.

43 13 Edw. I, c. 22 (1285).

44 See Walsh, Property, 380–382, and cases there cited and discussed.

45 Hawley v. Clowes, 2 Johns. Ch. 122 (N. Y. 1816); Mott v. Underwood, 148 N. Y. 463, 45 N. E. 1048 (1896); Obert v. Obert, 5 N. J. Eq. 397 (1846); Coffin v. Loper, 25 N. J. Eq. 443 (1875); McCord v. Oakland &c. Mining Co., 64 Cal. 134, 27 Pac. 863 (1883); Atkinson v. Hewitt, 51 Wis. 275 (1881); Walsh, Property (2d Ed.), 382. In Mott v. Underwood, *supra,* the court said: "As the rights of tenants in common are equal in the use and enjoyment of the estate, it is a general rule that a court of equity will not interfere between them, even to restrain waste, unless it be of a malicious character or so unusual or unreasonable as to constitute a wanton destruction of the estate." It is clear that this is the test of legal waste between cotenants. Equity will not restrain acts in the exercise of reasonable enjoyment by the cotenant because such acts are not waste at law. See Martyn v. Knowllys, 8 T. R. 145, 101 Eng. Rep. 1313 (1799). See *supra* note 44.

CHAPTER VI

EQUITABLE RELIEF AGAINST TRESPASS

§ 28. **Historical Development.** The early cases in Chancery involving trespass to land were cases of outrage in which Chancery intervened because the machinery of the law had broken down and had become impotent as against powerful defendants who were able to act in defiance of the law.[1] Inadequacy of damages obviously was not the basis of Chancery's action in these cases. The jurisdiction of equity in restraining acts of trespass because of the inadequacy of the legal remedy is a modern development, growing out of similar cases of waste committed by tenants for life and for years. This development may best be understood by a study of a succession of English cases by which it was accomplished, which are gathered together in Professor Ames' Cases on Equity.[2] Lord Thurlow, in 1786, refused to enjoin a stranger from inducing tenants to cut down timber,[3] but in a later case the same year he granted an injunction in a similar case against the stranger as well as against the tenants, though the stranger was liable only as a trespasser, not in waste.[4] Three years later he refused an injunction against a mere trespasser, doing permanent harm, there being no tenants and therefore no waste in the technical sense involved, as the stranger "might be turned out of possession immediately."[5] In another case Lord Thurlow granted an injunction against a tenant for life for opening and working a mine, a clear case of waste; but he also enjoined the tenant from digging across the line into adjoining land belonging to the re-

1 5 Holdsworth, Hist. Eng. Law (3d Ed. 1924), 190–214, 300. See § 3, *ante*.

2 *Ibid.* 486–502. Brief extracts from these cases indicating this development appear in Chafee, Cases on Equitable Relief Against Torts (1924), 36–40.

3 Mogg v. Mogg, Dickens 670, 1 Ames, Cas. Eq. 486 (1786).

4 Hamilton v. Worsefold, 10 Ves. 291, n. 88 (1786); Ames, *ibid.* 497 n.

5 Mortimer v. Cottrell, 2 Cox 205 (1789).

versioner, a clear case of trespass.[6] This is a very interesting illustration of how law grows. It was so clear here that the same irreparable wrong was being done in the trespass on the adjoining land as on the land which the defendant occupied as tenant for life, that the Chancellor was forced to grant the injunction restraining the trespass as well as the waste. Lord Eldon followed this case in 1801, in a similar case of working from a mine into the plaintiff's land, though no tenancy, and therefore no technical waste, happened to be involved.[7] In subsequent cases the right to an injunction against acts of trespass by which the plaintiff was being deprived of the substance of his estate, there being no dispute as to the plaintiff's title, was confirmed.[8]

Where the defendant by his answer raised an issue as to the plaintiff's title, a great deal of difficulty developed in granting injunctions against trepass in the nature of waste. In 1801 Lord Eldon refused an injunction against a defendant in possession, it appearing that the plaintiff had failed in an ejectment action. He said: "I remember perfectly being told from the bench very early in my life that, if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction."[9] In 1803 Lord Eldon denied an injunction to devisees against the defendant who claimed as heir, asserting that the will was not well executed. A permanent injunction was sought, apparently, as the plaintiffs claimed they were without remedy at law since the mortgagee had title.[10]

6 Lord Eldon refers to this case in Hanson v. Gardiner, 7 Ves. 305, 308, 1 Ames, Cas. Eq. 488 n. 2. (1802), "I have a note of a remarkable case, in which the name of one of the parties was Flamang. . . . Lord Thurlow hesitated much; but did at last grant the injunction: first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of the court enjoining in matter of trespass, where irreparable damage is the consequence."

7 Mitchell v. Dors, 6 Ves. 147 (Eng. 1801).

8 Kinder v. Jones, 17 Ves. 110 (Eng. 1810); Thomas v. Oakley, 18 Ves. 184, 1 Ames, Cas. Eq. 491 (1811).

9 Pillsworth v. Hopton, 6 Ves. 51 (Eng. 1806). To same effect see statement of Lord Eldon in Norway v. Rowe, 19 Ves. 144, 149 (Eng. 1812) quoted in 1 Ames, Cas. Eq. 488 n. 1.

10 Smith v. Collyer, 8 Ves. 89 (Eng. 1803). In Haigh v. Jaggar, 2 Collyer 231 (1845), the Vice-

What seems to have been a temporary injunction to continue until a disputed boundary could be determined, was granted in 1810.[11] In 1849 a temporary injunction was denied plaintiff who had started an ejectment, apparently because the defendant was in possession claiming title.[12] In Neal v. Cripps, in 1858, a temporary injunction was granted to the plaintiff, who had started an ejectment, against a defendant in possession claiming title, the waste restrained being the cutting of timber.[13] Thus in England, slowly and with much hesitation, equity carried over from waste to trespass the granting of specific relief in the form of injunction in all cases in which the plaintiff admittedly had title and the threatened injury was in the nature of waste in that it was irreparable like waste, and therefore damages at law would be inadequate. In cases of disputed title the rule was finally established that a temporary injunction would be granted a plaintiff in an ejectment suit pending the judgment in ejectment, against acts of destruction which would cause irreparable injury in order to preserve the *status quo.* A permanent injunction was refused in all such cases of disputed title, equity refusing such relief until the question of title had been settled in an action at law. These cases are discussed hereafter. The early cases in the United States are along the lines of the English cases though somewhat more liberal in granting specific relief against threatened acts of trespass.

§ 29. Trespass in Nature of Waste, Title Not in Dispute. Acts of a trespasser admittedly without title causing permanent damage, which would be waste if done by a tenant for life or for years, will be enjoined in equity everywhere because dam-

Chancellor said that in view of developments in equity the injunction might be granted at that date in a case such as Smith v. Collyer. The court, however, refused an injunction, the title of the parties being in dispute, partly because of the plaintiff's laches, and principally because the working of the mine was being carried on in a proper manner, the defendant was solvent and such was the only way of making reasonable use of the property.

[11] Kinder v. Jones, *supra* note 8.

[12] Davenport v. Davenport, 7 Hare 217 (Eng. 1849). The Vice-Chancellor felt bound by the cases, though he stated that if the case were new he would have granted the injunction without hesitation.

[13] Neal v. Cripps, 4 K. & J. 472 (Eng. 1858).

ages would be inadequate, just as damages are inadequate for similar acts by a tenant in cases of waste. The cutting of timber causes permanent destruction and will be enjoined irrespective of the money value of the timber.[14] The reason why damages would be inadequate is clearly expressed by a Maryland judge: "The jurisdiction of equity does not depend on the worth of the trees, merely as wood or timber, but on their location as part of an estate, rendering it more valuable by reason of the uses to which they are or may be devoted, the destruction of which would materially impair the enjoyment of the property."[15] For the same reason the removal of fixtures annexed as permanent improvements will be restrained.[16] The plaintiff is entitled

14 Wetherell v. Newington, 54 Conn. 67, 5 Atl. 858 (1886); Itasca v. Schroeder, 182 Ill. 192, 55 N. E. 50 (1899); Davis v. Reed, 14 Md. 152 (1859); Fulton v. Harmon, 44 Md. 251 (1871); Winslow v. Nason, 113 Mass. 411 (1873); Piper v. Piper, 38 N. J. Eq. 81 (1884); Wilson v. Mineral Point, 39 Wis. 160 (1875); Spear v. Cutter, 4 How. Pr. 175 (N. Y. 1849).

15 Shipley v. Ritter, 7 Md. 408 (1855). The following statement in this case is evidence of the advanced state of the law at that date in the United States as compared with the English cases: "We consider it the settled law of this state, that although an injunction will not be granted to restrain a trespasser merely because he is a trespasser, yet equity will interfere where the injury is irreparable, or where full and adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent multiplicity of suits."

Cases like Gause v. Perkins, 56 N. C. 177 (1857); 1 Cook, Cas. Eq. 497, refusing an injunction against working pine trees for producing turpentine or the cutting of timber in opening and developing new territory, involve acts which would not be waste on the part of a tenant for life and for years. See § 26, and cases cited, note 19, thereunder, *ante*. In Gause v. Perkins, *supra*, the title was in dispute, and a temporary injunction could not be granted because using the property for turpentine production was the only use to which the property could be put to advantage and there was no proof of the defendant's insolvency. See cases of trespass where title is in dispute, § 31, *post*. As to insolvency as a ground for equitable action see § 63, *post*. See also, West Point Co. v. Reymert, 45 N. Y. 703 (1871); Ketchum v. Depew, 81 Hun 278, 30 N. Y. Supp. 794 (1894); Thatcher v. Humble, 67 Ind. 444 (1879); Bruce v. Roper &c., 87 Va. 381, 13 S. E. 153 (1891).

16 Crescent City Wharf &c. Co. v. Simpson, 77 Cal. 286 (1888), 1 Cook, Cas. Eq. 502 (Moorings, anchors and buoys, fixtures, the removal of which by defendant would cause irreparable damage); Jenney v. Jackson, 6 Ill. App. 32 (1880);

to his land and every essential part of it, specifically, and cannot be required to accept damages instead. Any taking away of part of the *corpus* of the land, provided it actually results in substantial permanent harm will be enjoined,[17] though the courts have refused to interfere in cases where the damage, if any, would be very slight, and no substantial wrong is involved,[18] or where the trespass is not in the nature of waste and will be neither continuous nor repeated indefinitely so as to ripen into an easement.[19]

§ 30. Title Not in Dispute, Trespasses Continuous or Repeated Indefinitely. Though the acts of trespass are not in the nature of waste in that they are not destructive of the property, nevertheless an injunction will be made against continuous trespasses, or a succession of trespasses which threaten to be

Dudley v. Hurst, 67 Md. 44, 8 Atl. 901 (1887); Flood v. Van Wormer, 147 N. Y. 284, 41 N. E. 569 (1895).

17 U. S. v. Gear, 3 How. 120 (U. S. 1845); More v. Massini, 32 Cal. 590 (1867) [the court saying: "The gravamen is threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not specifically be replaced. In the class to which this case belongs no allegation of insolvency is necessary. The injury is irreparable in itself"]; 1 Cook, Cas. Eq. 503; 1 Ames, Cas. Eq. 508–519; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968 (1891); Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017 (1897).

18 Jerome v. Ross, 7 Johns. Ch. 315 (N. Y. 1823), Chancellor Kent saying (p. 331) that equity would not restrain taking rock from a ledge, nothing appearing to indicate that the stone was of any real value for any special use or as in any way adding value. Under later cases, if a series of trespasses was threatened, a bill of peace would lie to prevent a multiplicity of suits for damages. See § 30, following. See Stevens v. Beekman, 1 Johns. Ch. 318, (N. Y. 1814) [Chancellor Kent refusing an injunction against the cutting of timber. It is clear that these early cases were decided before the jurisdiction of equity in trespass had developed, and that they would be decided otherwise today]; Nicodemus v. Nicodemus, 41 Md. 529 (1874); Fisher v. Carpenter, 67 N. H. 569, 42 Atl. 177 (1893); Gates v. Johnston L. Co., 172 Mass. 495, 52 N. E. 736 (1899); Council Bluffs v. Stewart, 51 Iowa 385, 1 N. W. 628 (1879).

19 See § 30, *post;* also Worthington v. Moore, 53 N. J. Eq. 46, 30 Atl. 251 (1894), and Gates v. Johnston L. Co., 172 Mass. 495, 52 N. E. 736 (1899).

continued indefinitely, in order to prevent multiplicity of suits.[20] The remedy at law is clearly inadequate; the plaintiff may recover damages at law only up to the time of the trial, and he will therefore be forced to sue at reasonable intervals indefinitely to get such remedy as the law gives him, or in the alternative to forego his relief until shortly before his action would be barred by the statute of limitations. Even then, on recovering in such action, as the trespass would continue, the process would start all over again. As a make-weight reason the courts have also urged that an adverse user for the period of twenty years would create an easement by prescription, resulting in permanent injury to his interest in the land trespassed upon.[21] But as this could be prevented easily by physical interruption of the user or interruption by bringing an action for damages, it is evident that the true reason is the obvious inadequacy of successive suits at law for damages.[22]

Bills of peace may be maintained as a well-established practice in equity whenever the plaintiff comes in as a defendant who has been sued repeatedly in trespass at law or is threatened with repeated suits, and his right has been established by successfully defending one of them, to restrain the plaintiff from further suits, equity taking jurisdiction to prevent multiplicity of suits by finally settling the matter by injunction in a single action in equity.[22a] The prevention of the expense and hardship of defenses to repeated actions unjustly brought after the plaintiff's right has been determined at law is the purpose and basis of equity's intervention. But when the plaintiff in equity comes in as a plaintiff in actions at law for trespass against a trespasser

20 See cases in notes following.

21 Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418 (1891), Clark, Cas. Eq. 775; Richards v. Dower, 64 Cal. 62, 28 Pac. 113 (1883), and cases in notes following.

22 See Clark, Equity, 249. Professor Clark's suggestion that the plaintiff need not bring separate actions for each trespass, but may wait and recover for all trespasses up to the time of the trial, hence the adequacy of his remedy at law, hardly meets the difficulty. He has the right to sue for each trespass, and adequate relief requires that he bring new actions at reasonable intervals, say every three, six, or twelve months. Otherwise he is in effect denied anything like full relief. Waiting many years to recover accumulated damages is far from adequate relief.

22a See § 118, *post*.

acting without right or title, exactly the same reasons exist for intervention by equity to settle the matter and to prevent repeated suits at law by an injunction against the trespasser. If it is unfair that the plaintiff, wrongly sued as a trespasser, should be put to the trouble and expense of defending repeated suits after his right has been established, it is equally unfair that the plaintiff, suing the trespasser in the second class of cases, should be compelled to stand the trouble and expense of bringing repeated actions to recover his damages from time to time, hence the injunction against the trespasser restraining further trespasses and settling the controversy in a single suit.[23]

Therefore in cases of railroad companies trespassing by building their railroad on a public street, title to the land subject to the public easement being in the plaintiff, it is generally held that the continuous trespass will be enjoined, and damages for the past trespass recovered.[24] If the railroad has been completed

[23] See cases in notes following, also § 118, *post*.

[24] Williams v. N. Y. Central & C. R. Co., 16 N. Y. 97 (1857), ["although he (plaintiff) had a remedy at law for the trespass, yet as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits."]; Uline v. N. Y. Cent. etc. R. Co., 101 N. Y. 98, 4 N. E. 536 (1886); Canastota Co. v. Newington Co., 69 Conn. 146, 36 Atl. 1107 (1897); Davenport v. Johnson, 188 Ill. 472, 59 N. E. 497 (1901); Porter v. Midland Co., 125 Ind. 478, 25 N. E. 556 (1890). In the New York elevated railroad cases the wrong is an interference with the plaintiff's easement of light, air and access, as abutting owner, not technically a trespass, but the same principle applies to continuous nuisances as to trespass. In these cases the court assesses permanent damage, based on the railroad structure continuing permanently, the injunction to issue in case such damages are not paid the plaintiff within a stated time, or the Railroad Company may take the abutting owner's easement in condemnation proceedings. Shepard v. Manhattan El. R. Co., 117 N. Y. 442, 23 N. E. 30 (1889); Thompson v. Manhattan El. R. Co., 130 N. Y. 360, 29 N. E. 264 (1891); Bischoff v. N. Y. El. R. Co., 138 N. Y. 257, 33 N. E. 1073 (1893) and other cases cited, Walsh, Property, 711 n.; *ibid.* 111, n. 8. In either case the Railroad Company acquires the right to maintain its structure permanently in return for such "damages."

See long list of cases cited, 1 Ames, Cas. Eq. 522, n., for the universally recognized doctrine that equity will enjoin the use of property taken under the power of eminent domain until the required steps in condemnation proceedings have been taken.

the court withholds the actual taking effect of the injunction restraining the operation of the railroad until a reasonable time has elapsed in which the Railroad Company may secure the right by condemnation proceedings and payment of the amount awarded therein, or the permanent damage is fixed by the court and the injunction takes effect only in case this amount is not paid by a fixed date, as in the New York elevated railroad cases referred to above.[25]

In cases of continuous or repeated trespasses which will ripen into easements if continued for the period of prescription the injunction is granted as a matter of course, the courts usually giving as the reasons why damages at law is an inadequate remedy both the multiplicity of suits which would be necessary at law and the irreparable character of the injury if any easement should result by prescription from such adverse user.[26]

25 See preceding note.

26 See cases cited *supra* note 21. Repeated entries by cab or hack drivers on station approaches of a railroad company without a license from the Company and against its will were restrained in B. & M. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689 (1900) expressly on the theory of avoiding multiplicity of suits at law, citing many cases; "If the plaintiff were to sue at law the amount recoverable could not be large in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence there would arise a great multiplicity of suits." Washburn v. Miller, 117 Mass. 376 (1875) was distinguished as the Mass. statute giving full equitable powers to the Mass. courts was enacted after that case, and further, the title of the parties was in dispute therein. To same effect, N. Y. N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246 (1898).

Repeated entries, asserting a right of way, public or private, will be enjoined where no such right exists. Wetherell v. Newington, 54 Conn. 67, 5 Atl. 858 (1886); Stroup v. Chalcraft, 52 Ill. App. 608 (1893); Ladd v. Osborne, 79 Iowa 93, 44 N. W. 235 (1890).

Miscellaneous cases of repeated trespasses enjoined: Colliton v. Oxborough, 86 Minn. 361, 90 N. W. 793 (1902), [threatened entry and farming of land by defendant claiming as tenant]; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968 (1891), [maintenance of ditch through plaintiff's land to divert water from canal]; Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121 (1909); Abel v. Fletcher, 296 Ill. 604, 130 N. E. 353 (1921); Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87 (1910), [damages inadequate]; Martin v. Davis, 96 Iowa 718, 65 N. W. 1001 (1896); Walters v. McElroy, 151 Pa. 549, 25 Atl. 125 (1892); Hall v. Nestor, 122 Mich. 141, 80 N. W. 982 (1899), [excluding plaintiff from use of stream in rafting logs for entire season, damages inadequate remedy]. *Contra:*

The bringing of repeated actions for damages indefinitely would be necessary to prevent the easement from arising, and therefore the true theory of these actions is that of a bill of peace to prevent multiplicity of suits, as explained above. Cases involving trespasses by railroad companies in building and operating their lines, by hackmen in entering upon the private approaches of railroad companies in violation of their rules, of municipalities or individuals in asserting and using rights of way, public or private, without right, and other cases of a like character referred to above, involve an habitual and regular user which is obviously intended to continue indefinitely, requiring an injunction as the only adequate remedy.

Continuous trespasses by piling great quantities of stone or dirt upon the plaintiff's land present a variation from the cases above discussed, in that the plaintiff may clear his land by disposing of the rock or other material and recover the cost thereof in an action at law. Is this remedy adequate? In the sense that he will eventually be put back in *statu quo,* it probably is. But from the standpoint of "reason and conscience" in accordance with which equity acts, is it fair to require the plaintiff to submit to the trouble and inconvenience of finding a place for the deposit of such material, engage and supervise the labor and trucks required for such a considerable operation, or become responsible to a contractor therefore, and raise and pay out the money which it will cost, ultimately resulting in a judgment for damages which will include nothing for his trouble or use of capital but merely for the cost of the operation, and which judgment may be uncollectible? Specific relief in the form of a mandatory injunction requiring the trespasser to restore the plaintiff's property, putting the trouble and immediate cost directly on the wrongdoer responsible for the situation is so manifestly superior that the courts with very little hesitancy grant

Hart v. Hildebrandt, 30 Ind. App. 415, 66 N. E. 173 (1902), [no damage except threatened easement which may be prevented by filing notice that owner will dispute user, operating as interruption under Indiana statute]; Sanders v. Boone, 242 S. W. 66 (Ark. 1922), [defendant had twice erected a fence on plaintiff's land, which plaintiff had removed; injunction refused]; Behrend v. Buchmann, 169 Wis. 242, 171 N. W. 958 (1919); Bent v. Barnes, 72 W. Va. 161, 78 S. E. 574 (1913); Keil v. Wright, 135 Iowa 383, 112 N. W. 633 (1907).

this relief, holding that damages at law is inadequate.[27] These cases and cases of specific enforcement of contracts requiring affirmative acts by mandatory decree show a strong tendency toward the adopting of the general principle that specific relief will be given by equity in all cases in which its superiority to damages is definite and outstanding.

But when the defendant's trespass in storing or placing his goods or chattels on the plaintiff's land is a petty matter, so that the plaintiff may remove and dispose of such things with little trouble and expense, and in other cases of single acts of trespass or trespasses for brief periods, equity will not intervene, as the remedy at law is adequate.[28] In such cases the law provides petty local courts of limited jurisdiction for the disposition of such matters, where the expense of the administration of justice as well as the costs to the litigants are reduced to a minimum. A court of equity is of the highest type where trivial matters should not be brought. It is for these or like reasons that equity will not enjoin threatened repeated entries and disturbances by a mere brawler or disturber asserting no right or

27 Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67 (1888), [rocks piled on plaintiff's land in great quantity. "And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt."]; Eno v. Christ, 25 Misc. 24, 54 N. Y. Supp. 400 (1898); Goodson v. Richardson, L. R. 9 Ch. App. 221 (1873), [mandatory injunction requiring defendant to remove water pipes illegally placed in highway, fee to which was in plaintiff. Plaintiff could not be required to remove pipe himself and recover cost thereof because in a public street. Remedy at law might be adequate if pipes had been laid in private property of plaintiff]. See cases § 31, *post*, involving question of adequacy of ejectment for removal of structures encroaching on plaintiff's land. That injunction will issue unless the legal remedy is equally practical and efficient, see Deskins v. Rogers, 190 Pac. 691 (Okla. 1909); Stotts v. Dichdel, 70 Ore. 86, 139 Pac. 932 (1914).

28 Boyden v. Bragaw, 53 N. J. Eq. 26, 30 Atl. (1894), [removing a monument]. The court speaks of the trespass as completed, not continuing, damages being cost of restoring plaintiff's property by removal of monument. Mayfair Prop. Co. v. Johnson (1894) 1 Ch. 508.

See cases, notes 18 and 19, *supra*, refusing injunctions in cases of petty injuries, and in cases of entries to remove chattels of defendant on plaintiff's land.

seeking to establish no regular or habitual course of business or conduct which would involve repeated trespasses. Calling a policeman, followed by putting the defendant under bonds to keep the peace in a local magistrate's court is the proper remedy in such cases.[29]

The cases in which relief in equity turns on whether ejectment is an adequate remedy in favor of the plaintiff will be discussed in the following section in connection with trespass in equity when title to the land is in dispute.

§ 31. Title in Dispute, Temporary Injunctions, Permanent Injunctions After Title Settled at Law. In tracing the early cases in trespass we have seen that where title was in dispute between the parties no permanent injunction was granted until the title had been settled by an action at law.[30] The development of trusts as a great system of estates rested upon equity's recognition of the legal title, and equity was therefore scrupulous in leaving to actions at law by the trustee all matters involving legal ownership. Actions to recover trust property, real or personal, were brought by the trustee, and disputes as to legal ownership were left to the law courts, equity acting directly to protect the beneficiary only after definite default on the trustee's part. Historically, therefore, the tendency was

[29] Randall v. Freed, 154 Cal. 299, 97 Pac. 669 (1909); 1 Cook, Cas. Eq. 523 (trespasser entered, called names, hit owner, and when ordered off threatened to come back and repeat "whenever she chose"); Mech. Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703 (1888), [workman who insisted on staying at his old job after being dismissed].

Whether the threatened trespasses create a situation sufficiently serious to cause intervention by injunction must rest, in the last analysis, in the discretion of the court. Thus in Collition v. Oxborough, 86 Minn. 361, 90 N. W. 792 (1902); *supra* note 26, trespasses for a single season by defendant who claimed the right as tenant, were enjoined, though the repeated trespasses would be limited to a single season. Hall v. Nestor, *supra* note 26, is a similar case. In Lamprey v. Danz, 86 Minn. 317, 90 N. W. 578 (1902), repeated shooting of ducks in the air over the land of the plaintiff, used as a hunting preserve, was enjoined. On the other hand, in Moore v. Halliday, 43 Ore. 243, 72 Pac. 801 (1903), repeated pasturing of cattle by defendant on plaintiff's property was not restrained by injunction.

[30] See § 28, *ante*.

strong to leave to the law controversies involving the legal title. The courts apparently regarded the principle as axiomatic that equity would not determine a controversy involving the legal title to land, as they give no reasons for their holding. It has been suggested that the reasons for this rule were, 1st, that the method of trial by deposition in equity was not as satisfactory as trial by oral testimony in open court at law, and 2d, the practical difficulty of settling questions of title before the Chancellor's court, sitting only at Westminster, requiring suitors to appear there from all parts of the country, while from the beginning, through judges of assize and their successors, questions of title were tried locally at common law.[31] Yet equity was constantly called on to determine controversies involving the construction of purely legal rights, and to try and determine questions of fact incident to the decision of all sorts of controversies of every kind in equity. In specific performance cases equity did not hesitate to construe the law and determine the facts as to whether a valid legal contract existed or not. The same was, and is true in cases of waste, fraud, relief from penalties, in fact throughout the entire field of equity's activities. In other cases not involving this one question of title in which equity interposed to protect legal rights by more adequate remedies there was no hesitation whatever to determine all questions in dispute pertinent to the decision of the action in equity, though the same drawbacks and difficulties existed in trying all such issues in equity as would exist in trying issues of title.[32] There never was any good reason, therefore, for this rule, and the historical explanation is to be found in the acceptance by the Chancellor for centuries of the principle that legal ownership and title to land be determined at law by jury trial, the recognition of the legal title and its enforcement at law being an essential part of the

31 Clark, Equity, 244.

32 Professor Lewis gives a clear account of how courts of equity, holding that the same rule applied to cases of nuisance involving interferences with easements where a dispute as to the existence or extent of the easement was involved, carried over this rule mistakenly to cases of nuisance arising out of unreasonable interferences with the plaintiff's right of enjoyment of his property, in which no question of title was involved. See his article (1908), 56 U. of Pa. L. Rev. 289, at 302, *et seq.*

equitable system of land ownership in the form of uses and trusts.[33]

Though a permanent injunction was refused in cases of disputed title, it was finally decided in England and the United States in spite of Lord Eldon's earlier position, that a temporary injunction would be granted pending an action of ejectment brought to recover land in the possession of the alleged trespasser, in order to maintain the *status quo*, against serious acts in the nature of waste causing permanent depreciation in value.[34] Where the plaintiff is in possession a temporary injunction against the defendant is granted pending the bringing by him of an action of ejectment against the plaintiff, the injunction to become permanent if the defendant fail to prosecute such an action within a reasonable time.[35] It is clear that where ejectment will effectually settle the controversy there is no reason for intervention by equity except by way of temporary injunction in proper cases for that form of relief. An injunction can-

[33] See article by Professor Lewis, *supra*, at page 295, in which he states that the feeling that disputes over title to land should be determined by jury trial was so strong that equity never intervened to protect legal rights in land where such intervention would require the court to determine a dispute of title, though this feeling did not prevent enforcement of uses and trusts in favor of beneficiaries by equity without juries. It seems reasonable to infer that as recognition of the legal title in the trustee and the determination of all questions relating to it at law, were essential elements of the great system of trust estates in equity, the Chancellor naturally applied the same principle when disputes of legal ownership arose as incident to actions in equity to protect legal rights in land by means of equitable remedies.

[34] See § 28, notes 9–12, *ante*; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565 (1885); 1 Cook, Cas. Eq. 503 (restraining operation of mine pending ejectment; injunction continued as new trial was ordered on appeal); Snyder v. Hopkins, 33 Kan. 557, 3 Pac. 367 (1884); Scully v. Rose, 61 Md. 408 (1883); Heman v. Wade, 75 Mo. App. 339 (1898); McKay v. Chapin, 120 N. C. 159, 26 S. E. 701 (1897); Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271 (1896).

[35] Echelkamp v. Schrader, 45 Mo. 505 (1870), 1 Cook, Cas. Eq. 508; N. J. & N. C. Land &c. Co. v. Gardner Lacy L. Co., 113 Fed. 395 (1902), 1 Cook, Cas. Eq. 505 (bond for $10,000 to account for timber cut by defendant in case plaintiff won, plaintiff to take steps and formulate issue of title within 20 days to be tried by jury in the equity action, otherwise restraining order to be vacated); Piper v. Piper, 38 N. J. Eq. 81 (1884). As to the principles on which temporary injunctions are granted see § 57, *post*.

not be made to take the place of a judgment in ejectment where ejectment is an adequate remedy.[36] After the question of title has been settled in the ejectment suit, if continued or repeated trespasses, or trespasses in the nature of waste, are still threatened, a permanent injunction may be secured as in any of the cases discussed above where no dispute of title exists.[37]

There are many cases, however, in which ejectment will be inadequate. In any case of an encroaching wall or building, extending over on the plaintiff's property, practical difficulties exist in execution of the judgment in ejectment justifying the sheriff in refusing to accept the responsibility and the extensive cost and trouble of removing that part of the wall or building which encroaches on the plaintiff's land, and in these cases a mandatory injunction will issue ordering the defendant to remove the encroachment.[38] Even if the sheriff might be induced to act by advancing the cost of the operation and giving him a bond against possible liability therefrom, it is evident that specific relief compelling the defendant to assume directly the

36 Kellar v. Bullington, 101 Ala. 267, 14 So. 266 (1892), 1 Cook, Cas. Eq. 512; Kavanaugh v. Bavior, 215 Mich. 231, 183 N. W. 715 (1921); D. L. & W. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756 (1896); Kiernan v. Jersey City, 76 N. J. Eq. 114, 74 Atl. 139 (1909); Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923); Beck v. Ashland Cigar Co., 146 Wis. 324, 130 N. W. 464 (1911); and ejectment cases in notes following all of which directly or inferentially recognize this principle.

37 In addition to cases cited in § 30, *supra*, see cases referred to in notes immediately preceding, it being recognized expressly or impliedly in most of them that if after the question of title has been settled in the plaintiff's favor, and the trespasses continued or threatened thereafter, an injunction may then be obtained.

38 Hirschberg v. Flusser, 87 N. J. Eq. 588, 101 Atl. 191 (1917); Baron v. Korn, 127 N. Y. 224, 27 N. E. 804 (1891), [the court saying: "The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included with the nine inches. But in equity the obligation to remove can be placed directly on the parties who caused the wall to be erected."]; Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901); Baker v. Hunssiere-Latreille Oil Co., 106 So. 672 (La. 1926), (1926) 39 Harv. L. Rev. 1098; Kershisian v. Johnson, 210 Mass. 135, 96 N. E. 56 (1911); Tramonte v. Calorusso, 152 N. E. 90 (Mass. 1926), (1927) 27 Col. L. Rev. 100; Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448, 89 N. E. 534 (1909); Pile v. Pedrick, 167 Pa. 296, 31 Atl. 646 (1895).

trouble and expense of such removal is by far superior and more just than imposing that trouble and expense upon the plaintiff when an operation of considerable magnitude is involved.[39]

Whether ejectment can be maintained at law in cases of encroachments some distance above the surface, such as overhanging eaves or cornices, tipping or slanting buildings, telephone or telegraph wires; or below the surface in cases of foundation walls, water, sewer or oil pipes, and the like, is a question of real difficulty on which the cases are conflicting. Where it is held that ejectment will not lie the only remedy at law for the owner is to remove the encroachment and recover the cost thereof in an action of trespass, or to let it remain and sue for damages, if any, from time to time. It is obvious that we have in such cases instances of continuing trespasses discussed in the preceding section in which equity intervenes to prevent multiplicity of suits unless the encroachment may be removed with comparatively little trouble and expense so that the recovery of the cost thereof at law would be an adequate remedy.[40] In states where

39 Compare cases of continued trespass by piling huge quantities of rock, soil or refuse on plaintiff's land, the plaintiff not being required to remove same and to recover the cost, note 27, *ante*. In Curtis Mfg. Co. v. Spencer Wire Co., *supra* note 38, the court points out that after judgment in a second action of trespass the plaintiff would be entitled to an order at law abating the nuisance. The court said "We see no reason . . . why it should be compelled to take this more dilatory method to enforce its rights."

40 That ejectment will lie see D. L. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 36 Atl. 756 (1896), [oil pipe line]; Kiernan v. Jersey City, 76 N. J. Eq. 114, 74 Atl. 139 (1909), [following Breckenridge case without discussion of the principle]; Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906), [asserting that possession of land includes possession of space occupied by telephone wires stretched across plaintiff's lot, arguing that a bridge built across, with a house on it, would be an adverse possession, hence ejectment lies.]; McCourt v. Eckstein, 22 Wis. 153 (1867), [foundation below surface; see later Wisconsin cases below]; Murphy v. Bolger Bros., 60 Vt. 723, 15 Atl. 365 (1888), [eaves]; Johnson v. Minn. Tribune Co., 91 Minn. 476, 98 N. W. 321 (1904).

That ejectment will not lie because such encroachments above or below the surface involve wrongful user, not possession, the remedy being by injunction restraining continuing trespasses, see Rahn v. Milwaukee R. R. Co., 103 Wis. 467, 79 N. W. 747 (1899), [foundation, plaintiff in full possession of surface]; Zander v. Valentine &c. Brew. Co., 95 Wis. 162, 70 N. W. 164 (1897), [same as preceding case]; Beck v. Ashland Cigar Co.,

ejectment will lie in these cases, we encounter very much the same question, because, as in the cases of encroachments on the surface, if the operation is at all extensive, involving considerable trouble, expense and possible liability, the sheriff cannot be expected to act unless he is financed and protected against liability by a bond, which shifts the burden to the plaintiff. As in the surface encroachment cases, therefore, specific relief by mandatory injunction is far superior to damages, putting the trouble and cost directly on the wrongdoer where it belongs.[41] It is difficult to understand on what principle some of the courts allow ejectment in these cases. It is settled law about which there is no question that twenty years continuance of such en-

146 Wis. 324, 130 N. W. 464 (1911), [ejectment held proper remedy, building encroaching six inches at surface, but approving the two preceding cases]; Rasch v. North, 99 Wis. 285, 74 N. W. 820 (1898), and Huber v. Stark, 124 Wis. 359, 102 N. W. 12 (1905), [cases of projecting eaves, plaintiff in possession of surface, hence ejectment would not lie]; Harrington v. Port Huron Co., 86 Mich. 46, 48 N. W. 641 (1891) [sewer pipers through plaintiff's land a continuing trespass. Plaintiff had possession. Ejectment not allowed]. That a mandatory injunction will be made to remove such encroachments see Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448, 89 N. E. 534 (1909), [encroaching foundation ordered removed, though this involved tearing down costly building thereon, balance of foundation not being sufficient to support the building]; Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278 (1897); Pentony v. Penn. R. R. Co., 231 Pa. 464, 80 Atl. 1052, (1911), [eaves and foundation walls. No discussion]; Norwalk H. & L. Co. v. Verman, 75 Conn. 662; 55 Atl. 168 (1903); Mulrein v. Ewisbecker, 37 App. Div. 545, 56 N. Y. Supp. 240 (1889), [foundation wall below surface encroached 3 to 4 inches]; Willmarth v. Woodcock, 58 Mich. 482, 25 N. W. 475 (1885).

41 See cases in preceding note. The weight of authority and of reason is in favor of the remedy by mandatory injunction. The New Jersey cases there cited, holding that ejectment is an adequate remedy, do not consider the question of whether or not the sheriff could be required to enforce the judgment, in removing an oil pipe line in the Breckenridge case or the sewer pipes in the Kiernan case. See Comment (1917) 27 Yale L. Jour. 265, the author asking what the sheriff would do if called on to remove electric power wires heavily charged or water pipes with water under heavy pressure. Would he remove a projecting foundation which would mean the collapse or taking down of the defendant's building? Could he be required to accept the possible liability for damages from such enforcement? That the relief given is almost always by injunction in these cases is the answer to the problem, though generally given with little analysis of the question.

croachments above or below the surface gives rise to an easement by prescription, not to title to land by adverse possession.[42] The defendant is not in possession in these cases, and therefore ejectment should not be allowed.

§ 32. Will Equity Try Disputed Titles Today? Effect of Codes, Trial by Jury. There is hardly room for argument that the trial of an issue of legal title to land is in no essential respect different from the trial of any other issue as to the existence of legal rights to chattels, legal rights under contracts or assignments, or legal rights in any case in equity in which the existence or non-existence of such rights must be determined in order to decide the case. In all cases in equity involving any issue of law and fact other than the legal title to land, courts of equity have usually tried and determined the issue without any suggestion that the legal right be first determined at law, except in nuisance cases in which, as a result of a confusion of ideas, it was held that existence of a nuisance must be established by an action at law before equity would intervene by injunction.[43] No reason exists, apart from a feeling which developed

42 Grace M. E. Church v. Dobbins, 153 Pa. 294, 25 Atl. 1120 (1893); Keats v. Hugo, 115 Mass. 216 (1874). See discussion of the different forms of user and the nature thereof required to create easements by prescription, Walsh, Property (2d Ed.), 621–629. It is obvious that in all of these cases continuance of the trespass results in an easement by prescription. The trespasser is not in possession. What part of the land could he claim as his after twenty years? The owner, having sole possession of the entire surface, is not ousted from his possession. He is merely disturbed therein by an adverse user.

43 As to nuisance cases see § 34, *post*. A list of instances of disputed questions of fact on which the legal right depends tried and disposed of in equity without a jury would be a list of most of the different divisions of equity jurisdiction. Thus in specific performance cases the plaintiff must establish the existence of a legal contract. No preliminary action at law has ever been necessary. In cases of waste whether the acts charged amount to waste, and whether or not such acts have been committed or are threatened will be determined in equity without a trial at law. In cases of unfair competition, injuries to business, violations of patents, copyrights, trade names, &c., there are almost always issues of fact involving the existence of the plaintiff's legal right, and whether or not it has been violated, but with no suggestion ultimately that these matters must be first settled by an action at law. And so on, through

from the history of equity in its relation to the law, for the rule that issues of title must first be settled by an action at law in trespass cases before equity will intervene. Under the Code in the thirty Code States and territories, and in England under the Judicature Acts, merging law and equity into a single system of law, courts and procedure, there is no possible room for the existence of any such rule.[44] It is the duty of the court in all cases as a court of both law and equity to decide every issue, legal and equitable, arising under the pleadings and proof, to the end that complete relief, legal and equitable, be given the parties in a single action. Nothing could be more absurd than to insist that the plaintiff must bring two actions in trespass cases, an action of ejectment or trespass for damages, to settle his title, and another distinct action for an injunction, the very thing which the Code sought to end by the merger of law and equity. We find therefore, that under the Code a single action determines the controversy, and the question of disputed title will be tried and decided in the action for an injunction as one of the issues on which the case turns. Of course damages must be inadequate as a remedy in order that an injunction may be had, the Code making no difference in the substantive law apart from ending the rule requiring separate trial of issues of title. For the same reason an injunction cannot be used as a substitute for ejectment where ejectment will give full and final relief. Many of the cases cited and discussed above on the adequacy of damages and ejectment are from code states.[45]

the entire list of action in equity brought to protect legal rights except in these cases of trespass and nuisance.

[44] See Chapter IV, *ante*.

[45] West Point Iron Co. v. Reymart, 45 N. Y. 703 (1871); Broiestedt v. South Side &c. R. Co., 55 N. Y. 220 (1873); Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1886); Sylvestor Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649 (1895); See New York and Michigan cases, *supra* notes 38 to 41, in which the question involved is whether ejectment or a mandatory injunction is the proper remedy. The question of title is settled in the suit for a mandatory injunction. Where ejectment may be found to be sufficient the merged action should be tried by jury. See note 48, *post*. In New Jersey and other non-code states the dispute of title is settled at law by a judgment in ejectment. If for practical reasons this judgment cannot be enforced by the sheriff, as in Hirschberg v. Flusser, *supra* note 38, or if there is no dispute as to title, a mandatory injunction is made, as in the Pennsylvania and Massachusetts cases cited in the same note. In Gilbert v. Boak

The one doubtful question arising as a result of code merger of law and equity is whether the issue of title in trespass cases must be tried by jury if the defendant insists, under the constitutional provisions preserving trial by jury in all cases in which that right existed when the constitution became operative. There is no longer any doubt that equity has the power to try that issue without a jury if the parties waive jury trial.[46] The plaintiff waives by bringing his action on the equity side of the court, and the defendant waives by pleading without raising the question of his right to jury trial.[47] In an action to recover possession of land, where there is doubt whether or not ejectment will be adequate, and whether or not a mandatory injunction will be required, it seems settled that the defendant is entitled to jury trial and therefore the case should be placed on the calendar for jury cases, the judge at the trial being a court of equity to make a mandatory injunction in the alternative—if justice demand it, as explained in an earlier section.[48] But where ejectment is not involved, can the defendant insist, in an action for an injunction against repeated or destructive trespass, that the issue of title be tried by jury?

Fish Co., 86 Minn. 365, 90 N. W. 767 (1902), the court held that the plaintiff could not split his action by suing for his damages in a later suit at law.

46 Waterloo Mining Co. v. Doe, 82 Fed. 45 (1897), [the court holding that the rule requiring that the disputed title be first settled at law was a rule of expediency and policy, which the parties could waive, and therefore affirming a decree for a permanent injunction based on the trial in equity of the disputed title]; Bicking v. Florey's Brick Works, 53 Pa. Sup. Ct. 358 (1913), [equity decided question of title which turned solely on construction of a deed]; Miller v. Lynch, 149 Pa. 460, 24 Atl. 80 (1892), [no real basis for defendant's claim of title]; Tantlinger v. Sullivan, 80 Iowa 218, 45 N. W. 765 (1890); Hogg v. Olson, 101 Wis. 118, 76 N. W. 1121 (1898). *Contra:* D. L. & W. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756 (1896), [the court asserting lack of power to try the question of title though both litigants were anxious to have the court dispose of the question, and though the question turned solely on the construction of a deed].

47 See cases above cited, also § 23, *ante,* as to jury trial in code states.

48 See ejectment cases cited and discussed in § 22, notes 20–23, *ante,* especially City of Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923), [see strong dissenting opinion by Judge Cardozo concurred in by Judge Crane, based on the argument that the action, brought to compel the removal of buildings by defendant, was strictly an action in equity, not ejectment, as ejectment would not be an adequate remedy.]

His argument is that as the law stood under the Constitution prior to the Code equity refused an injunction until the issue of title had been settled at law by jury trial, and therefore the trial of that issue comes within the constitutional provision preserving trial by jury. On the other hand, all that the Constitution preserves is trial by jury as it existed in 1789 when the Constitution was adopted. At that time no relief in equity of any kind had developed in trespass cases.[49] Is it possible to argue reasonably that the constitutional mandate requiring trial by jury includes issues arising in cases which have become purely equitable as the result of the extension of equitable jurisdiction, though before such extension relief could be had at law only, and therefore by jury trial? By weight of authority it must be regarded as settled that the constitutional provision is not to be interpreted as ignoring further development and extension of relief in equity, and in all cases in which equitable relief is so extended, so that the action is now recognized as a suit in equity to be determined according to equitable principles and practice, the constitutional provision has no application.[50] The jurisdiction of

49 See § 28, *supra*.

50 In many states the jurisdiction of equity to quiet title has been extended by statute so that the plaintiff need not prove that he is in possession, the purpose being to finally settle disputes of title to land in all cases in which ejectment cannot be maintained, or would be inadequate. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495 (1883); 1 Cook, Cas. Eq. 389. Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213 (1884); Louisville & N. R. R. Co. v. West Un. Tel. Co., 234 U. S. 369, 34 Sup. Ct. 810 (1914). The disputed question of title is tried in equity though it could be tried only by jury prior to these statutes. When defendant is in possession claiming title ejectment must be brought, N. J. &c. L. Co. v. Gardner Lacy L. Co., 113 Fed. 395 (1902). Specific performance of contract has been greatly extended by modern cases to include construction and other contracts calling for supervision in certain cases where damages would be inadequate, though at the time the constitution was adopted relief could be had only at law by jury trial, and recent statutes have extended specific performance to arbitration contracts and others where formerly the only relief was by trial by jury. See §§ 64, 65, *post*. In Balt Process Co. v. My-Coca Co., 125 Atl. 179 (Md. 1924), a Maryland statute which provides that no court shall refuse to grant specific performance of contract unless the defendant files a bond or otherwise satisfies the court that he is able to pay any judgment recovered against him at law, was sustained as not violating the constitutional provision preserving trial by jury. This was a radical extension of specific performance, but as it had back of it

equity in trespass cases has developed altogether since the Constitution was adopted. All disputed questions of fact in those cases, as well as the question of title, could be tried only at law by jury before equity intervened to grant specific relief where reason and conscience required it. Yet the right of equity to dispose of any issue arising in these cases other than that of title without jury trial is everywhere conceded. There are, of course, many other cases in which equitable relief has developed since 1789, in which it is settled beyond doubt that no right to jury trial exists as a matter of right, in fact no question of the right of the parties to have the issues in such cases tried by the court without a jury has been raised.[51] We must conclude, therefore, as a matter of settled law as well as of principle, that the right to jury trial of the issue of title in trespass cases brought in equity for specific relief does not exist under the Constitution. In code states the entire controversy may be tried and disposed of, including the question of disputed title, by the court with-

insolvency of the defendant as a basis of equitable relief, it was an extension of equitable jurisdiction within the potential field of equity. If the change simply carries over actions at law into equity, trial must be by jury in spite of the statute. See note on above case (1925) 9 Minn. L. R. 156, citing McCoy v. Johnson, 70 Md. 490, 17 Atl. 387 (1889); North Penn. Coal Co. v. Snowden, 42 Pa. 488 (1862); Twines v. Brenckle, 249 Ill. 394, 94 N. E. 495 (1911); N. J. Land &c. Co. v. Gardner Lacy L. Co., 113 Fed. 395 (providing for trial of disputed title by jury in equity action to quiet title). The controlling principle seems to be this: If the change is simply a development of the potential power of equity to give relief where the remedy at law is inadequate, the constitutional mandate does not apply; if it is an arbitrary transfer of an action at law to equity, though the remedy at law is adequate, then the constitutional provision controls, and trial must be by jury. See Cecil v. Clark, 44 W. Va. 659, 667, 30 S. E. 216 (1898).

[51] See preceding note, referring principally to the more striking extensions of equity jurisdiction by statute. The most cursory review of the development of equity along other lines reveals at once many cases in which equitable relief is now given but at the time the constitution was adopted relief could be had at law only. The inquiry should be: Is this an equity case turning on equitable principles? If it is, then the constitutional provision has no application, irrespective of how or when the jurisdiction of equity developed. On the other hand if it is a law case, turning on legal principles, arbitrarily transferred to equity, trial must be by jury, though not necessarily at law.

out a jury, subject to the right of the court to submit any question to a jury as an aid to the court.[52]

In non-code states the prevailing rule seems still to be that a dispute of title must first be settled by an action at law before equity will intervene, though the folly of requiring two actions when the entire matter may be finally disposed of in equity in a single suit has led the courts to hold that where there is no real question of the plaintiff's ownership, or where the question of title turns on the construction of a deed or other document of title which the judge and not the jury would decide at law, equity will decide the issue of title and give relief without a prior action at law.[53] The position of the New Jersey courts

52 West Point Mining Co. v. Reymert, 45 N. Y. 703 (1871); Broistedt v. South Side Co., 55 N. Y. 220 (1873); Ladd v. Osborne, 79 Iowa 93, 44 N. W. 235 (1890); Martin v. Davis, 96 Iowa 718, 65 N. W. 1001 (1896); Poheman v. Lohinger, 60 Neb. 364, 83 N. W. 201 (1900); Collition v. Oxborough, 86 Minn. 361, 90 N. W. 793 (1902). See cases cited *supra* note 45, also cases of mandatory injunctions in code states where ejectment would not be adequate, *supra* notes 38 to 41.

When equity has jurisdiction to grant an injunction in any tort case, damages for past acts are given to prevent another suit at law, and such damages are not found by a jury. There is no doubt that most of this has developed in equity since the constitutional provision of trial by jury became effective. If it appears on the trial, though grounds for equitable relief existed when the action was brought, because of events occurring thereafter equitable relief cannot be given, damages will be given instead in code states in which law and equity are merged, the defendant having no constitutional right to trial by jury. Miller v. Edison Elec. Illum. Co., 184 N. Y. 17, 76 N. E. 734 (1906); Tucker v. Edison &c. Co., 100 App. Div. 407, 91 N. Y. Supp. 439 (1905), *aff'd*, 184 N. Y. 548, 76 N. E. 1099 (1905); Van Allen v. N. Y. Elec. R. Co., 144 N. Y. 174, 38 N. E. 997 (1894). But if, when action was started, no possible right to relief in equity existed, the case must be sent to the jury calendar for trial on the question of damages. Peats Co. v. Bradley, 166 App. Div. 167, 151 N. Y. Supp. 602; Saxton v. N. Y. El. R. Co., 12 App. Div. 263, 42 N. Y. Supp. 508 (1896); McNulty v. Mt. Morris El. L. Co., 172 N. Y. 410, 65 N. E. 196 (1902). These cases illustrate the principle involved very clearly. An equitable action existed when the action was brought. Equity retains the jurisdiction so acquired by making final disposition of the case. But where no right to equitable relief existed when the action was brought the suit is purely legal and the defendant may insist on jury trial.

53 Miller v. Lynch, 149 Pa. 460, 24 Atl. 80 (1892); Bicking v. Florey's Brick Works, 53 Pa. Sup. Ct. 358 (1913). See *supra* notes 30–39.

that equity has no power to decide the question of title, though neither party wants a jury trial, is obviously erroneous and unfair,[54] and is contrary to the rule prevailing almost everywhere else.

[54] D. L. & W. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756 (1896), the court taking the position, now universally regarded as erroneous, that the court had no power to try the title, though both parties were anxious for such trial, and the construction of a deed was the only question involved. See, however, Freer v. Davis, 52 W. Va. 1, 43 S. E. 164 (1902), where the court said that equity had no jurisdiction even with consent of both parties to determine the disputed title. Defendant was in possession, and therefore ejectment coupled with a temporary injunction would seem to cover the situation.

CHAPTER VII

EQUITABLE RELIEF AGAINST NUISANCE

§ 33. **Nuisance—Nature of the Tort.** The term nuisance is applied to torts of two distinct groups, first, acts of wrongful user by an owner or possessor of land resulting in an unreasonable interference with the rights of enjoyment of the owner or possessor of neighboring land, and, second, wrongful interferences with easements or other incorporeal rights. Trespass will not lie in either case because no wrongful entry upon the land of another is involved. The first class of cases is made up of violations of the maxim, *Sic utere tuo ut alienum non laedas.* To secure the fullest measure of enjoyment to the owner of land his right of user must be limited by this rule restraining him from any use of his land which will unreasonably interfere with his neighbor's rights of reasonable enjoyment. Otherwise every owner would be in constant fear of the practical destruction of his property by the obnoxious use of adjoining property by a neighbor. Each is permitted the most complete use and enjoyment of his land consistent with similar and equal rights of user in his neighbors. In other words a balance of reasonable users as between owners of neighboring properties must be struck, and any use of land by one of the parties which is in violation of this balance, unreasonably interfering with the rights of enjoyment of the others, is a nuisance, a wrong punished by the courts since the beginning of the common law.[1]

[1] In Campbell v. Seaman, 63 N. Y. 568 (1876), the nuisance arose from pollution of the air by sulphuric acid gas. The court said: "*Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. . . . Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. . . . But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable or unlawful use of it, so as to

The assize of nuisance was the ancient remedy by which this right of enjoyment was protected, existing side by side with the assize of novel disseisin which protected the possession.[2] It was also the remedy for violations of easements and other incorporeal rights in land where trespass would not lie because no possessory right was involved as the owner of the easement had a mere right of user. The assize of nuisance would lie only in favor of a freeholder, and therefore the owner of an easement in gross had no action for an interference therewith as his easement was not appurtenant to a dominant estate.[3] Later, when the action on the special facts of the case took the place of the assize of nuisance, which therefore became obsolete, case was the only action at law for both forms of nuisance.[4] No distinction was ever made during the progress of this historical development between nuisances arising from wrongful user of neighboring property and nuisances arising from violations of easements. In both classes of cases violations of incorporeal rights in land not amounting to trespass or disseisin were dealt with by the same remedies. A tendency to treat these two classes of cases as differing fundamentally seems to be a recent product of the law schools with little or no support even in the modern cases.[5]

produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor.''

That a violation of the maxim, *Sic utere tuo* &c., involving wrongful interference with the plaintiff's right of reasonable enjoyment, is the basis of nuisances where no easement exists, see Judson v. Los Angeles Sub. Gas. Co., 157 Cal. 168, 106 Pac. 581 (1910); Hulbert v. Cal. Portl. Cem. Co., 161 Cal. 239, 118 Pac. 928 (1911), and cases cited in section following involving such nuisances.

2 Glanv. lib. XIII, c. 34–36; Bracton, f. 33; 2 Poll. & Mait., Hist. Eng. Law 53.

3 Walsh, History Eng. & Am. Law 402; 3 Holdsworth, Hist. Eng. Law 154–157.

4 3 Holdsworth, *ibid.* 154–157, 7 *ibid.* 328–331; Walsh, *ibid.* 402. Prof. Holdsworth makes the same distinction between natural rights of enjoyment and easements referred to by Mr. Lewis in his article discussed in the following note.

5 See article by Mr. Lewis (1908), 47 U. of Pa. L. Rev. 289 (O. S. Vol. 56), in which he asserts that ''trespass on easements'' is not properly nuisance, restricting nuisance cases to cases of unreasonable disturbance of a neighbor's right of enjoyment. He points out (pp. 307–310) that interferences with easements were remedied by the assize of nuisance and later by the action

It is a mistake to treat nuisances arising from the pollution of the air as the violation of a natural right, like the pollution or

on the case, as explained above, and that the term "nuisance" continued to be applied to both sets of cases without distinction, down to modern times, and that the term is still so applied. He points out that after some uncertainty in Blackstone's time and thereafter [2 Bl. Comm. 403; Lawrence v. Obee, 3 Camp. 514, 170 Eng. Rep. 1465 (1814)] it is now settled law that a user of property is not wrongful as against a neighbor's right of enjoyment until it begins to interfere with an actual enjoyment of his property by the neighbor, and therefore no prescriptive right is acquired by the carrying on of an objectionable business for twenty years as against adjoining property which is not improved and occupied so that the business in question does not interfere with the neighbor's actual enjoyment of his property. [Campbell v. Seaman, 63 N. Y. 568 (1876); Sturgis v. Bridgman, 11 Ch. Div. 852 (1879)]. As soon as the neighbor improves and occupies his land so that the business becomes a nuisance under the law, a cause of action thereon arises and the period of adverse user begins to run. See cases cited by Mr. Lewis, *ibid.* 313 n., and his discussion of the problem. On the other hand a diversion or pollution of a stream or other violation of an easement gives an immediate right of action though no present use of the stream or other easement by the plaintiff is interfered with, and the damages recovered are nominal, and therefore the period of prescriptive user begins to run at once, not when the plaintiff begins to make use of the stream. [Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589 (1900); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900); Walsh, Property (2nd Ed.) 641]. He therefore applies the term "trespass on easements" to these cases. The term "trespass," however, cannot properly be applied. The owner of the easement has no possession of the servient land, or, in the case of a stream, of the water in the stream. He has an incorporeal right of user. That was why the assize of nuisance and its successor, case, were the appropriate remedies, not trespass. Interference with an easement is an interference with an absolute property right, irrespective in most cases of whether the damage is present or prospective. Interference with a neighbor's reasonable right of enjoyment very properly involves a present existing right of enjoyment of the property in its present condition, not as it may by chance be developed in the future. In both cases there is an interference with a legal right in land not amounting to trespass. The same remedy has been given in both cases throughout the history of the law. There seems to be no good reason, therefore, why the term "nuisance" should not apply in both cases, which is the generally accepted usage, including under this heading all legal injuries to land or incorporeal interests therein not amounting to trespass or waste, and excluding also injuries to land from mere negligence. If disturbance of an easement is not a nuisance it is left without a name. See (1914) 9 Ill. L. Rev. 278.

diversion of a stream, or a violation of the right of adjacent or subjacent support, and to treat such nuisances as violations of a series of natural rights incident to ownership of land.[6] Any user which unreasonably interferes with the neighbor's right of enjoyment is a nuisance, irrespective of whether it takes the form of polluting the atmosphere, of noises or vibrations, of an unreasonable absorption or drawing away of percolating or surface waters drying up the neighbor's land, or other user not involving the violation of a natural right to air.[7] It is the violation of the neighbor's reasonable right to enjoy his property which is the essence of the wrong in all of these cases, not a violation of any natural right to the air or atmosphere above his land in its natural state or to a natural right in percolating or surface waters. Easements between dominant and servient estates exist between the upper and lower riparian owners along the banks of streams and between adjoining owners in cases of easements of support. It has become the fashion with some modern writers and teachers to classify all rights of this kind as "natural rights," reserving the term "easement" for easements created by act of the parties.[8] This seems to be so closely identified with the mistake of confusing the violation of easements arising by natural right with violations of the neighbor's reasonable right of enjoyment that it must be discussed

[6] 1 Tiffany, Real Property (2nd Ed.), 1118, *et seq.;* Clark, Equity 259, *et seq.* Confusion of a serious kind results from this terminology and arrangement, and it is almost completely at variance with the language and practice of the courts in the actual cases. Definite rights between dominant and servient estates are easements, whether arising by natural right, as riparian rights in streams and easements of support, or by grant or prescription. "Natural rights" not amounting to easements, as to air and to percolating and surface waters, are merely phases of the general right of enjoyment protected under the principle, *Sic utere tuo,* etc.

[7] See cases cited in notes above and notes in next section. The unreasonable diversion or drawing off of percolating waters by city water works, drying up adjoining lands, is a good illustration of a nuisance involving no violation of "natural right." Forbell v. New York, 164 N. Y. 522, 58 N. E. 644 (1900), and other cases cited, Walsh, Property (2nd Ed.), 635, n. 3, 636. See *ibid.* 632–634, for other instances of nuisances arising from unreasonable interferences with surface waters.

[8] See 1 Tiffany, Real Property (2d Ed.), 1118, *et seq.,* 2 Gray Cas. Prop. c. 2, "Natural Rights"; 1 Warren, Cas. Prop. 570–590 "Air," 591–632 "Water."

in any disposition of the entire problem. Historically, as we have seen, the law gave the same relief in the same form of action in all of these cases. It is settled beyond doubt that no easement by natural right exists between adjoining properties as dominant and servient estates in light and air or surface or percolating waters.[9] In such cases damages are recovered solely because of unreasonable user by the defendant of his own property, not because of the violation of a right existing in favor of a dominant estate. In cases of riparian rights in streams and right of support the recovery is always because of the violation of a right existing in favor of a dominant estate. In these latter cases the courts have generally called these rights easements, and enforced them as such though they arise by natural right rather than by grant or other act of the parties.[10] They are easements in fact, though they arose by natural rights since they run with the land against all subsequent owners of the servient estate in favor of all subsequent owners of the dominant estate. Therefore cases involving their violation should be classed with cases involving the violation of conventional easements created by the parties or their predecessors, while cases of interferences with the air and with surface and percolating waters must be classed with nuisances arising out of wrongful interferences with the neighbor's right of reasonable enjoyment of his property.

9 Walsh, Property (2d Ed.), 631–637, and cases there cited and discussed.

10 Thus in Bonami v. Backhouse, 1 El. Bl. & El. 622, 120 Eng. Rep. 643 (1858), Willes, J., said in comparing conventional easements created by grant or prescription with easements of support or in streams arising by natural right:—"But the character of the rights, when acquired, is in each case the same," quoted in Dalton v. Angus, 6 App. Cas. 740 (1881), the court adding: "The same distinction exists as to rights in respect of running water, the easement of the riparian land owner is natural; that of the mill owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, *i. e.*, it must be established by prescription or grant." See cases referred to and discussed in the sections following treating of equitable relief in nuisance cases, the courts granting relief in protection of easements by natural right exactly as in protection of easements arising by grant or prescription.

In Birmingham v. Allen, 6 Ch. D. 284 (1877), James, L. J., said: "Whether you call it an easement or a natural right incident to property, or a right of property it seems to me that those are only different modes of expressing the origin of the right, and do not express any difference in the right itself."

§ 34. **Nuisance. Equitable Relief. Early Development.** In the thirteenth and the early part of the fourteenth centuries, when specific relief of an equitable character could be had in the King's Court, as explained heretofore, specific relief against nuisances was given with some freedom.[11] Intervention by equity to restrain nuisances by injunction is a comparatively modern development. In a case decided in 1583 the question of restraining a nuisance involving the diversion of a water-course was raised and the principle recognized, though relief was refused because the plaintiff had brought an assize of nuisance.[12] In 1720 an injunction was granted in a similar case.[13] Temporary mandatory injunctions against serious interferences with water-courses were granted in 1785 and 1804.[14] The subsequent development of the jurisdiction of equity in nuisance cases, discussed in the sections immediately following, has progressed so far that as a practical matter equitable relief, with damages awarded as incidental thereto, has very largely displaced the remedy at law.

There was, of course, no reason why the existence of a nuisance should be established by an action at law as a prerequisite of equitable relief. In one of the earliest cases, above referred to,[15] though the point was expressly raised that the plaintiffs should have "established their title at law," "yet the court decreed for the plaintiff, and agreed it usual to have such bills in the first instance in this court, and cited Lord Aylesford's Case lately, and some others." But in 1784 Lord Thurlow laid down the principle that where the existence or extent of an easement in a stream was in dispute equity will not give relief until after the rights of the parties to the easement have been settled by an action at law.[16] In easement cases where the existence or extent of the easement was in dispute it was natural that this rule should be established, in accord with the corre-

11 2 Holdsworth, Hist. Eng. Law 248. *Supra* § 2.

12 Osburne v. Barter, Choyce Cas. Ch. 176, 21 Eng. Rep. 102 (1583), 1 Ames, Cas. Eq. 553.

13 Bush v. Western, Prec. Ch. 530, 24 Eng. Rep. 237 (1720), 1 Ames, Cas. Eq. 553, Walsh, Hist. &c. 484.

14 Robinson v. Lord Byron, 1 Bro. C. C. 588, 28 Eng. Rep. 1315 (1785), by Lord Thurlow, 1 Ames, Cas. Eq. 566, and Lane v. Newdigate, 10 Ves. 192, 28 Eng. Rep. 818 (1804), by Lord Eldon, 1 Ames, Cas. Eq. 74.

15 Bush v. Western, *supra* note 13.

16 Weller v. Smeaton, 1 Bro. C. C. 572, 28 Eng. Rep. 1304 (1784).

sponding rule in trespass cases,[17] as title to an interest in land was involved. There was no such excuse for holding, as Lord Eldon did,[18] that the existence of a nuisance must be established by an action at law in cases of unreasonable interferences with a neighbor's right of enjoyment of his property, as no dispute of title exists in such cases. In cases of waste, of trespass where title is not in dispute, and all other instances of equitable intervention where the legal title is not in issue, equity disposes of all material questions of law and fact without a prior action at law, as we have explained heretofore.[19] No doubt Lord Eldon was influenced by the easement cases above referred to holding that the dispute of right and title to the asserted easement be settled at law before equity would act, as Mr. Lewis has pointed out.[20] In New York, Chancellor Kent followed Lord Eldon,[21] and this mistaken doctrine became quite generally established in many of the states that the existence of the nuisance must first be established by an action at law before equity would intervene without reference to whether the nuisance arose from disturbance of easements or interferences with a neighbor's rights of enjoyment.[22] In code states this rule is obviously impossible, as is the corresponding rule in trespass cases where title is in dispute,[23] and the cases hold that it no longer exists.

17 See Ch. VI, *ante*, § 32.

18 Atty. Gen. v. Cleaver, 18 Ves. 211, 34 Eng. Rep. 297 (1811); Crowder v. Tinkler, 19 Ves. 617. 34 Eng. Rep. 645 (1816).

19 See § 32, *ante*.

20 47 (1908) U. of Pa. L. Rev. 289 (O. S. Vol. 56).

21 Van Bergen v. Van Bergen, 3 Johns. Ch. 282 (N. Y. 1818). Lewis, *supra*, note 10 at 294.

22 City of New Castle v. Raney, 130 Pa. 546, 18 Atl. 1066 (1890), 1 Cook, Cas. Eq. 418; English v. Progress Co., 95 Ala. 259, 10 So. 134 (1891); Nelson v. Milligan, 151 Ill. 462, 38 N. E. 239 (1894); Pana v. Central &c. Coal Co., 260 Ill. 111, 102 N. E. 992 (1913); Outcalt v. Helme Co., 42 N. J. Eq. 665, 4 Atl. 669 (1886), [Easement in dispute]; Todd v. Staates, 60 N. J. Eq. 507, 46 Atl. 645 (1900), [title to easement]; Green v. Lake, 54 Miss. 540 (1877), [discussed in Mr. Lewis' article, *supra*, note 20]; Eastman v. Amoskeag Co., 47 N. H. 71 (1866) [dispute of extent of easement]; Grove v. Long, 89 W. Va. 652, 109 S. E. 817 (1921); Howard v. West Md. R. Co., 138 Md. 46, 113 Atl. 574 (1921), [trespass]. See Mathias v. Holland, 132 Va. 274, 111 S. E. 134 (1922). See (1910) 10 Col. L. Rev. 355; (1914) 9 Ill. L. Rev. 278.

23 See discussion of this question and cases cited, § 32, *ante*. In England since Lord Rolt's Act, and under the Judicature Acts merging law and equity, the old rule no longer exists. In Roskell v. Whit-

In other states the tendency seems to be to abandon it under the later cases.[24] The principles involved have been sufficiently dis-

worth, 19 W. R. 804, 806 (1871), Bacon, V. C., admirably states the rule which should prevail, and which generally does prevail today: "I have no doubt that, at all events, the court being satisfied of the existence of a nuisance which it has the power to abate or redress, whether public or private, has not hesitated—I may say could not in justice and reason hesitate—to exercise its jurisdiction and authority. But, if any doubt could exist on that subject, such doubt must be wholly removed and extinguished since the passing of the two recent statutes. . . . (Lord Cairns' & Lord Rolt's Acts) . . . I conceive it to be the clear paramount duty of the court, not less in obedience to the statutory enactments than to the dictates of good sense and justice (which is the perfection of good sense) to decide at once any question for the decision of which it has satisfactory materials, without sending the parties litigant to some foreign extramural tribunal, there to undergo the dilatory, expensive, uncertain hazards of an inquiry which this court possesses the full means of deciding, and which the statute has said, in terms unmistakable, that it is the duty of this court to decide."

In Broiestedt v. South Side R. Co., 55 N. Y. 220 (1873), a trespass case, the court said: "It is urged that the legal right must be first established by an action at law. This was formerly necessary if the legal title was at all doubtful, but since the Code this court has held that the legal right may be established and the equitable remedy, by injunction, obtained in the same action. Corning v. Troy Iron & Nail Factory, 40 N. Y. 191" [a nuisance case]. Campbell v. Seaman, 63 N. Y. 568 (1876); Hinckel v. Stevens, 17 App. Div. 279, 45 N. Y. Supp. 678 (1897); Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884); Robinson v. Baugh, 31 Mich. 290 (1875); Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649 (1895). Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923), as explained in § 22, notes 20 and 21, *supra*, does not change existing law in New York. The court held that a motion to transfer the case to the jury calendar should be granted because the action was in effect an ejectment suit, requiring trial by jury under the constitution. It was not based on the need of a trial at law before an action would lie in equity.

[24] Sullivan v. Jones & Laughlin, 208 Pa. 540, 57 Atl. 1065 (1904), the court disposing of the case without a prior trial at law, though the rights of the parties were conflicting, in disregard of the rule. The rule was evaded in Mowday v. Moore, 133 Pa. 598, 19 Atl. 626 (1890). As in trespass cases in states recognizing the rule, if there is no real doubt of plaintiff's right the courts will dispose of the case without a prior trial at law. See § 32, *ante*, also Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388 (1903); Woodward v. Worcester, 121 Mass. 245 (1876); Beach v. Sterling Iron & Zinc Co., 54 N. J. Eq. 65, 33 Atl. 286 (1895). So, also, as in trespass cases, if the point is not raised by the defendant, it is regarded as waived. See *supra* note

cussed above in treating of the rule requiring trial of disputes of title at law before equity will act in trespass cases.[25]

§ 35. **Protection of Easements in Equity.** Following the classification adopted in the two preceding sections, violations of easements and similar incorporeal interests in land are nuisances, subject to the same remedies at law as are nuisances arising out of wrongful interferences with the plaintiff's right of reasonable enjoyment of his property, and easements include rights in streams between riparian owners and mutual easements of support of land in its natural state between adjoining owners. In these as in other tort cases equity intervenes by injunction only where damages at law is an inadequate remedy. In some cases the nuisance causes destruction of ornamental trees and shrubs, or other permanent growth, such as fruit trees, and the damage is irreparable in the same sense that such permanent damage is irreparable in similar cases of destruction by a trespasser.[26] In most cases of nuisance, however, the inadequacy

17, also Coast Co. v. Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21 (1898), the court holding that if the adequacy of the legal remedy (of ejectment or indictment for public nuisance) had been raised in time equitable relief would have been barred, but not having been raised, it was waived. Here the existence of the nuisance was in dispute, and no action establishing its existence had been brought at law, but the court gave final relief nevertheless, which seems to be opposed to the mistaken position taken by the same court in D. L. & W. R. Co. v. Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756 (1896), that the court has no power to grant equitable relief before the question of legal right has been settled at law. Clearly contrary to the Breckenridge case is Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (1892). In some of the later cases recognizing the rule the cases seem to turn on the adequacy of the remedy at law—that the assertion of the legal right at law would make relief in equity unnecessary, rather than on the technical establishment of the legal right at law as a prerequisite of equitable relief, as in Parks v. Parks, 121 Me. 580, 119 Atl. 533 (1922), and Pana v. Central &c. Coal Co., 260 Ill. 111, 102 N. E. 992 (1913), the latter case emphasizing the caution which should be used in granting injunctions interfering with business when the remedy at law might well be adequate.

25 See § 32, *ante*.

26 Campbell v. Seaman, 63 N. Y. 568 (1876), the court saying: "These damages are irreparable too, because the trees and vines cannot be replaced and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste."

of damages does not arise from this cause, but rather because continuous or successive violations are involved which will require repeated actions at law.[27] As the comparatively few cases in which irreparable injury was the basis of equitable relief also involved a threatened continuous violation which would require repeated suits at law to recover damages, it may fairly be stated that the controlling reason for intervention by equity in nuisance cases is the inadequacy of the legal remedy because of the necessity of repeated suits at law. Here, as in similar cases of trespass, the action in equity is really a bill of peace, a single suit in equity taking the place of many successive suits at law for damages, equity ending by injunction the violation of the plaintiff's rights, and in that way removing the occasion for suits at law to recover damages thereafter.[28] As equity permits

27 In Campbell v. Seaman, *supra*, note 26, the court said:—"Here the injunction also prevents a multiplicity of suits. . . . Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted, by the termination of such litigations by a single suit." In N. Y. Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841 (1892); Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900), and Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589 (1900), [aff'd, without opinion, 168 N. Y. 664] the injunction against diversion or pollution of a stream was granted on the express ground that otherwise the wrong would ripen into an easement by prescriptive user, the real basis of this reason being the avoidance of multiplicity of suits at law, as explained in the text, *supra*. In Pennington v. Brinsop Co., 5 Ch. D. 769 (1877), the court takes the same position, referring to Clowes v. Staffordshire Potteries &c. Co., 8 Ch. App. 125 (1872), as holding that though the damages were nominal injunction should issue because of the inconvenience of leaving the parties to repeated and successive actions for damages. In Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (1892), a nuisance case, the court said: "The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury. . . . This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely." To same effect, Stollard v. Cushing, 76 Cal. 472, 18 Pac. 427 (1888); Galway v. Met. Elev. R. Co., 128 N. Y. 132, 28 N. E. 479 (1891); Joyce v. Jonesville, 132 Minn. 121, 155 N. W. 1067 (1916); Nelson v. Mulligan, 151 Ill. 462, 38 N. E. 239 (1894).

28 See corresponding cases of con-

the recovery of the damages sustained by the plaintiff up to the time the injunction is granted, the entire controversy is settled in a single suit,[29] which is so obviously superior to the legal remedy that it has, as a practical matter, almost entirely supplanted it in modern law.[30]

In many of the cases involving violations of easements the court, without specific reference to repeated actions at law, states that the remedy at law is inadequate because the wrongful user will ripen into an easement if continued for the period required to create easements by prescription.[31] As explained heretofore in the chapter on trespass, as this user may be interrupted at any time by a suit for damages, the real inadequacy of the remedy at law is the necessity of such repeated suits.[32] Where the wrongful interference with the plaintiff's right has ended so that no further or continuous interference is threatened, no injunction will be granted, as the plaintiff's remedy at law is adequate.[33] But where the wrong complained of threatens to be continuous or indefinitely repeated, equity intervenes as a matter of course, in the majority of cases assuming the remedy at law to be inadequate, the obvious reason for this assumption being the necessity of repeated acts at law, though nothing to that effect may be expressly stated by the court.[34] A detailed consideration of the more important classes of cases follows:

(1) Riparian Rights in Streams. Each owner of land on the banks of a stream is entitled to have the stream come to him in its natural state, without unreasonably substantial diminution or pollution. Each owner has an easement in the stream to that extent in favor of his land as the dominant estate against owners of riparian lands above him, such lands being the servient

tinuous or repeated trespasses, § 30, *ante.*

29 Most of the cases involving nuisance in equity stand for this rule, as in the corresponding cases of waste and trespass.

30 See modern cases cited in this chapter giving equitable relief in nuisance cases.

31 See cases to that effect referred to *supra,* note 27.

32 See § 30, *ante.*

33 This is involved by clear implication in most of the cases.

34 Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589 (1900). See long list of cases of injunctions against nuisances arising from violations of easements cited in 1 Ames, Cas. Eq. 511, *et seq.,* in most of which the inadequacy of damages is assumed without specific assignment of the reason.

estates. As against lower proprietors he has the right of drainage by the stream, and the right that it shall not be set back on his land by a dam.[35] Any substantial diminution or pollution by those above him is a violation of his right irrespective of whether he is making any present actual use of the stream or not, and therefore irrespective of whether he has suffered any actual damage. His right to the stream is absolute, not based on actual present user. He has the present right to use the stream for any purpose that does not violate the rights of other riparian owners, and equity protects this right by an injunction against violations which would ripen into easements by prescriptive user if not stopped or interrupted, eliminating the need of repeated suits at law which would otherwise be required to bar an easement by prescription.[36]

Though the courts speak of each riparian owner's right to use the stream reasonably so as not to interfere unreasonably with the like right in the other riparian owners, it is obvious that any substantial diminution or pollution must be unreasonable in the usual case, because if any considerable number of riparian owners should diminish or pollute the stream in the same way (and every owner's rights in the stream must be identical with the rights of any other owner) the stream would be greatly reduced in flow or destroyed for actual use by the other lower riparian owners. Therefore in a case like Warren v. Parkhurst,[37] in which pollution of the plaintiff's stream by

35 As to riparian rights in streams at law see Walsh, Property (2nd Ed.), 637–643.

36 Amsterdam Knitting Co. v. Dean, 162 N. Y. 268, 56 N. E. 757 (1900); Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589 (1900), aff'd 168 N. Y. 664, 61 N. E. 1131 (1901); Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142 (1900); Whalen v. Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913); Bailey v. Schneitzius, 45 N. J. Eq. 178, 13 Atl. 247 (1888); Barneich v. Mercy, 136 Cal. 207, 68 Pac. 589 (1902); Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218 (1894); Downing v. Elliott, 182 Mass. 28, 64 N. E. 201 (1902). See *supra*, note 27. Streams of very small size may be used to extinction if necessary for ordinary domestic purposes. Miner v. Gilmour, 12 Moore, P. C. 131, 156, 14 Eng. Rep. 861 (1858); Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799 (1904), and other cases cited, Walsh, Property (2nd Ed.), 638 n. 3.

37 45 Misc. 466, 92 N. Y. Supp. 725 (1904), 1 Cook, Cas. Eq. 544; aff'd, 186 N. Y. 45, 78 N. E. 579 (1906), Clark, Cas. Eq. 272. The Court of Appeals quotes with approval Foster, J., in Lockwood Co. v. Lawrence, 77 Me. 297 (1885): "The acts of the respondents may

twenty-six mill owners above him was enjoined, an injunction against each defendant could have been had to prevent multiplicity of suits, so that the case involved the joinder of twenty-six actions in equity turning on the same questions of law and fact. The statement by the court that an action against each defendant individually might not lie because the pollution by one of them might not be unreasonable though similar pollution by twenty-six creates an obvious nuisance, can never be true in cases of pollution or diminution of streams. Each owner has exactly the same right to use the stream as every other. A user to be reasonable must be such that *all* may use the stream in the same way. The controlling test is whether or not the use complained of may be enjoyed by all the others without interfering unreasonably with the plaintiff's right in the stream. Where such use by a considerable number is a nuisance, it is clear that the use by each one is unreasonable. These cases of streams differ radically from cases of obstructing streets or sidewalks where obstruction by many may be necessary to give rise to a tort. Cases of this kind are discussed hereafter.[38]

The question does not seem to have been decided of the liability of a defendant who uses the stream so as to unreasonably reduce its flow, but because upper riparian owners are not using the stream as they legally might, the diversion by the defendant does not reduce the stream below what would be its size if such upper owners were using it to a reasonable limit. It is submitted that an injunction should issue, though the immediate result may not cause serious damage to the plaintiff.

(2) Natural Easements of Support. These cases differ from cases of streams above discussed, because no prospective user in the future is involved. Therefore slight disturbances of the

be independent and several, but the result of these several acts combine to produce whatever damage and injury these complainants suffer, and in equity constitutes but one cause of action." The latter case involved deposits of sawdust from saw mills of the defendants. As each riparian owner must have the same right to deposit sawdust in the stream, the fact that such deposits by the defendant constituted a nuisance is conclusive proof that the deposit by each one exceeded the right of user which each and all had, and it was therefore an unreasonable interference with the rights of the other riparian owners.

38 See *post*, notes 52, 53, 54, and text to which they refer.

right to adjacent or subjacent support causing no perceptible damage give rise to no action at law, as the natural right or easement of support is not violated unless material damage is caused.[39] As the damage recoverable in these cases is limited to damage to the land in its natural state exclusive of damages to improvements, the right involved is of little practical importance, and very little authority exists on its protection in equity.[40]

(3) Conventional Easements. The earlier cases in which equity intervened to protect easements created by express grant or reservation or by prescription were principally cases of ancient lights in England, the easement arising by prescription.[41] In the United States the courts have everywhere repudiated this doctrine because of the absence of adverse user as between adjoining owners, since the owner of the land with the building enjoying light and air from his neighbor's adjoining land is in no sense a wrongdoer.[42] For the same reason they have repudiated the English doctrine of an easement of support extended by prescription to a building standing for over twenty years close to the line of division between the two properties.[43] Easements of light and air arise often by express grant or reservation, including cases of lots sold with reference to a map on which streets and parks are laid out, the grantee acquiring an easement to light and air over land so designated immediately in front of his lot as well as the easement of ingress and egress.[44]

39 Smith v. Thackerah, L. R. 1 Com. Pl. 564 (1866).

40 See Walsh, Property (2nd Ed.), 646, n. 3, 4, as to damages in such cases. The difficulty of satisfying the court that the plaintiff's land in its natural state would be disturbed by the defendant's proposed excavation is another obstacle to equitable relief by injunction. See Lasala v. Holbrook, 4 Paige 169 (N. Y. 1833).

41 The English cases on ancient lights appear in 1 Ames, Cas. Eq. 534–547, and in Chafee, Cas. Eq. 47–54.

42 Walsh, Property (2nd Ed.), 626, citing Parker v. Foote, 19 Wend. 309 (N. Y. 1838); Hayden v. Dutcher, 31 N. J. Eq. 217 (1879); White v. Bradley, 66 Me. 254 (1876); Rennyson's Appeal, 94 Pa. 147 (1880); Keats v. Hugo, 115 Mass. 204 (1874).

43 Walsh, *ibid.* 627; Gilmore v. Driscoll, 122 Mass. 199 (1876); Handlan v. McManus, 100 Mo. 124, 13 S. W. 207 (1890); Tunstall v. Christian, 80 Va. 1 (1885); Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209 (1893), [but see Aston v. Nolan, 63 Cal. 269 (1883)].

44 Walsh, Property (2nd Ed.), 631; Peck v. Conway, 119 Mass.

Easements of light and air are frequently created by so-called "restrictions" against building, or building outside of stated limits, on adjoining property.[45] Easements in streams may be modified by grant, reservation or prescription, and as so modified they become conventional easements, though still of the same nature as before and subject to the same remedies both at law and in equity.[46]

Easements by grant or reservation, express or implied, and easements arising by prescriptive user, are protected in equity by injunction in practically all cases, the remedy at law being inadequate as involving a multiplicity of suits, and loss or modification of the easement resulting after twenty years of the wrongful interference if such suits are not brought. Of course damages will be adequate, and equity will not interfere, where there is no real threat of further interruption, and therefore no need of an injunction, but such cases are rare. The question usually involved is the character and extent of the easement, a question of the law of property.[47] Cases in which equity has intervened to protect conventional easements, either by negative or mandatory injunction, in the more usual classes of easements, are cited in the notes.[48] A few illustrative cases are sufficient as

546 (1876); Ladd v. Boston, 151 Mass. 585, 24 N. E. 858 (1890); Hagerty v. Lee, 45 N. J. Eq. 1, 15 Atl. 399 (1888); Weigmann v. Jones, 163 Pa. St. 330, 30 Atl. 198 (1894). For easements in land laid out on a map for streets or parks see Lennig v. Ocean City Ass'n, 41 N. J. Eq. 606, 7 Atl. 491 (1886); Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190 (1890); Matter of Leggett Ave., 80 App. Div. 618, 80 N. Y. Supp. 673 (1903). In England and a few states easements of light and air arise by implied grant. See Walsh, Property (2nd Ed.), 612, 613.

45 See preceding note. For other easements created in the form of restrictive covenants see Walsh, Property (2nd Ed.), 598, note 10.

46 See cases cited *supra,* notes 12, 21.

47 For the legal principles and rules at law applying to the different kinds of easements see Walsh, Property (2nd Ed.), 596–649, *ibid.* 656 (ways), *ibid.* 650 (Party Walls).

48 Rights of way: Bakeman v. Talbot, 31 N. Y. 366 (1865); Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442 (1890); Tucker v. Howard, 128 Mass. 361 (1880); Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. 865 (1886); Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427 (1888); Thorpe v. Brumfitt, L. R. 8 Ch. App. 650 (1873); Smith v. Young, 160 Ill. 163, 43 N. E. 486 (1895); Simons v. Morehouse, 88 Ind. 391 (1882); Devore v. Ellis, 62 Iowa

relief is freely given if the easement is found to exist and repeated or continuous interferences are proved.

(4) Easements of Light, Air and Access by Abutting Owners in Streets. In addition to his right to use public streets in common with all other persons as a public right, the abutting owner has an easement of light, air and access over the land in the street in front of his property. This easement often arises in conveyances of land by reference to a map filed as a public record which shows such streets in a subdivision of property in course of development for residential purposes, as explained above.[49] The private easements in such land so appropriated as future streets are not lost when the streets are subsequently paved and become public streets by dedication or otherwise. The easement, however, arises with exactly the same content and incidents when a new street is put through, the municipality acquiring title by condemnation proceedings. His easement as abutting owner attaches as a necessary incident of the street as a public way.[50]

When title to the land included in the street remains in the abutting owners, subject to the public easement, they are protected against any wrongful use of the street or road not included within the public easement by remedies at law and in equity against trespass, as explained in the preceding chapter.[51] The land is theirs, subject only to rightful use of it as a public street or way, and of course they can have no easements in their own land. The easements here discussed arise only where title to such land is acquired by the municipality.

The abutting owner's easement of access is subject to the right of the public to use the street in all proper ways. If he unrea-

505, 17 N. W. 740 (1883). Water Pipes: Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. 1094 (1895); Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18 (1892); Spencer v. Kilmer, 151 N. Y. 390, 45 N. E. 865 (1897). Easements of flowage by dam: Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978 (1892). Drainage: Thayer v. Payne, 56 Mass. 327 (1848); Sanderlin v. Baxter, 76 Va. 299. Party wall easements: Everett v. Edwards, 149 Mass. 588, 22 N. E. 52 (1889); Matthews v. Dixey, 149 Mass. 595, 22 N. E. 61 (1889); Brooks v. Curtis, 50 N. Y. 639 (1872); Douglas v. Coonley, 156 N. Y. 521, 51 N. E. 283 (1898); Traute v. White, 46 N. J. Eq. 437, 19 Atl. 196 (1890).

49 See *supra,* note 44.

50 Walsh, Property (2nd Ed.), 710. See cases in notes following.

51 See § 30, notes 12 and 13, *ante.* See also Walsh, Property (2nd Ed.), 705–710.

sonably interferes with the rights of the public by blocking the street and sidewalk in front of his premises in loading or unloading merchandise he is guilty of a public nuisance, and may be held liable by any person who can show special damage.[52] A balance must be struck between the rights of the public in the streets and the easement of access in the abutting owner. An unreasonable blocking of the street by cabs or automobiles parking in front of his premises so as to interfere unreasonably with his easement of access is a nuisance for which the individuals causing the obstruction are liable in damages, and which will be enjoined in equity if the wrong is continuous or indefinite repetition is threatened. In these cases the act of any one the defendants would not usually be a wrong; it is the combined act of many which constitutes the nuisance.[53] These cases differ from cases of pollutions or diversions of streams by many upper riparian owners in that the right of the plaintiff differs radically in the two cases. Any material diminution or

52 An injunction will issue against him if such violations are of the regularly recurring sort. Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264 (1887). See also on the abutting owner's right, Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633 (1886); Mathews v. Kelsey, 58 Me. 56 (1870); Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 633 (1886), and other cases cited, Walsh, Property (2nd Ed.), 707, n. 9.

53 Thorpe v. Brumfitt, L. R. 8 Ch. App. 650 (1873). Equity intervenes by injunction in an action in which the different wrongdoers are joined, though their acts are entirely independent each of the others. If they act in concert or their combined acts immediately and directly result in the nuisance, they are joint tort feasors and each will be liable for the entire damage, but if each acts independently of the others each is liable at law only for such part of the damages as was caused by his act. Harley v. Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000 (1891); Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550 (1891); Lockwood Co. v. Lawrence, 77 Me. 297, 306 (1885); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265 (1920) and cases cited and discussed therein. The last two cases involved the pollution of streams and are subject to the criticism contained in note 37, *supra*, where Lockwood Co. v. Lawrence is discussed. It is settled law that equity will intervene against all the defendants in a single action, whether their acts are concerted or independent. Liability at law where their acts are independent is not so clear. The above cases make each liable only for the results of his own acts, to be recovered against each in a separate action. In equity the power of the court to apportion past damages among the defendants could not be questioned, making relief in equity superior in every respect.

pollution is a violation of the riparian owner's right. The abutting owner's right is subject to the rights of the public in the street and is violated only by an extensive interference not justified as a reasonable use of the street. In the first case the plaintiff's right is necessarily violated by the individual act of each defendant if it appear that their joint acts constitute a nuisance;[54] in the second case this is clearly not true.

Interferences with this easement by the erection of elevated railway structures in the street and the operation of elevated trains, or the building and operation of steam railroads, or other interferences of a permanent nature pursuant to franchises granted by the proper public authorities and for the public benefit, have been dealt with in different ways. In New York the right to maintain and operate elevated railroads as against abutting owners has been secured either by condemnation proceedings and payment of the permanent depreciation in value of the abutting land due to the permanent operation of the railroad, or by payment of a like amount to the abutting owner in an action brought by him for an injunction, the injunction being granted to take effect at a date stated unless the defendant pay to the plaintiff the amount of permanent damage as found by the court, on payment of which sum the plaintiff shall grant to the defendant the right to maintain and operate its road permanently.[55] The injunction is granted on the theory of a bill of peace, to prevent a multiplicity of suits, as in other cases of interferences with easements,[56] and the defendant is permitted to acquire the plaintiff's easements on paying the amount of permanent damage because the court recognizes that the defend-

54 See note 37, *supra*, and text to which it relates.

55 Galway v. Metrop. El. R. Co., 128 N. Y. 132, 28 N. E. 479 (1891); Pappenheim v. Metrop. &c. R. Co., 128 N. Y. 436, 28 N. E. 518 (1891); Gray v. Manhattan &c. R. Co., 128 N. Y. 499, 28 N. E. 498 (1891); Hunter v. Manhattan &c. R. Co., 141 N. Y. 281, 36 N. E. 400 (1894).

56 In Galway v. Metrop. El. R. Co., *supra*, the court said: "The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance, and must, from the nature of the case, continue so long as that necessity exists. . . . Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted."

ant may acquire them by condemnation proceedings, the proceeding in equity becoming in effect the same thing.[57]

In some states, in the cases above referred to, permanent damages may be recovered at law, the defendant acquiring the right to the plaintiff's property permanently so far as may be required for its business.[58] This makes unnecessary intervention by equity. The New York doctrine, though not always expressed in the same form, prevails generally.[59]

§ 36. Nuisance by Wrongful Interference with Neighbor's Reasonable Right of Enjoyment. Any continuous or habitually repeated use of his land by one person which unreasonably interferes with the right of another to enjoy his property in a reasonable way is a nuisance which equity will enjoin to prevent a multiplicity of suits for damages at law. It does not matter whether this interference is by polluting the air,[60] by noises, vibrations or concussions,[61] by the seeping of sewage or other objectionable material through the soil to the plaintiff's premises,[62] by creating sources of danger such as powder mills or magazines,[63] hospitals for infectious diseases such as smallpox,[64] by drying up adjoining lands through pumping great quantities of water from wells, lowering the water table of surrounding lands,[65] or whether it be from any other use by the defendant of his property. In each case equity acts to restrain the wrongful user because it violates the duty imposed by law on every owner or occupier that he shall so use his land as not to

57 In O'Reilly v. N. Y. El. R. Co., 148 N. Y. 347, 42 N. E. 1063 (1896), Judge Gray said: "The Court recognizes the fact that the defendants had the right to appropriate the street easements by condemnation proceedings. . . . The proceedings by which the court ascertains and fixes the damages done to the abutting property in the deprivation of easements, are, in fact, but a substitute for condemnation proceedings."

58 Suehr v. Chicago Sanit. Dist., 242 Ill. 496, 90 N. E. 197 (1909); Smith v. Point Pleasant &c. R. Co., 23 W. Va. 451 (1884).

59 Harding v. Stamford Water Co., 41 Conn. 87 (1874); N. Y. N. H. &c. Co. v. Fair Haven R. Co., 70 Conn. 610, 40 Atl. 607 (1893); Grey v. Simmons, 60 N. J. Eq. 385, 45 Atl. 995 (1900); Columbus & West R. Co. v. Witherow, 82 Ala. 190, 3 So. 23 (1887).

60 See *post* notes 70–72.

61 See *post* notes 70–72.

62 See *post* note 77.

63 See *post* note 78.

64 See *post* note 79.

65 See *post* notes 80–82.

interfere unreasonably with the reasonable enjoyment of their property by the owners of neighboring land. The confusion resulting from treating nuisances of this kind as violations of natural rights to light and air, and to surface and percolating waters under the American cases, has been discussed heretofore. They are not violations of a series of natural rights to air, water, and the like, except only as they are violations of this right of reasonable enjoyment.[66]

The elimination in England and the code states, and to a great extent in the other states as well, of the old rule, requiring the establishment of the nuisance by an action at law before equity would intervene,[67] has had this result that nearly all actions for nuisance are now brought for equitable relief by injunction, with damages up to the trial awarded as incident to the injunction, disposing of the entire matter in a single suit. As a practical matter, therefore, the determination of what amounts to such unreasonable interference with the plaintiff's reasonable right of enjoyment as to constitute a nuisance has passed from courts of law to courts of equity, though a branch of the law as distinguished from equity, subject to the undoubted right of the plaintiff to bring his action at law for damages only if he prefers.[68] We will now discuss briefly,

66 See *supra*, § 33, notes 6, 7, 8, 9, 10 and text to which these notes refer. An illustration of the results of this confusion is found in statements sometimes met with that the English cases recognize no natural right in percolating and surface waters in favor of one neighbor as against another, each having the exclusive right to the water on his own land, while the American cases have departed radically from the English view in the municipal water cases in which municipalities and water companies have been held liable for nuisance in taking so much water by pumping from wells that neighboring land is dried up. As explained in notes 83 and 84, hereafter, there is no difference whatever between the English and American cases. There is no natural right to air, percolating or surface water apart from the right of reasonable enjoyment which every man has in his land by virtue of his ownership as against unreasonable interference therewith by any neighbor. This is just as true under the American as under the English cases. The supposed innovation in the United States is simply non-existent except as a mistaken notion having its root in the confusion above referred to.

67 See § 34, *supra*.

68 A counterpart of this growth of equitable relief to the practical exclusion of the legal remedy is found in waste. Specific relief with damages is so manifestly superior to repeated suits at law that no one

therefore, what constitutes a nuisance in the different groups of cases, leaving for future consideration the question of the court's "discretion" in "balancing the equities," so-called, and the matter of giving substitutional damages instead of specific relief, and also the question of preliminary injunctions, in other tort cases as well as in cases of nuisance.[68a]

In all the cases that follow, equity determines whether a nuisance exists or not without modification of the rules of law which govern the case. There is no such thing as an equitable nuisance.[69] Equity decides the legal question as in any other case in which a legal right is protected by equitable relief.

There must be an unreasonable interference with the plaintiff's right of enjoyment in all of these cases. The character of the neighborhood is an important consideration. What would be reasonable according to the usual standard of the average man in a neighborhood given over to manufacturing is often very unreasonable in a residential neighborhood.[70] A use of prop-

uses the legal remedy where the wrong is continuous or repeated indefinitely. See Poertner v. Russel, 33 Wis. 193 (1873), the court saying: "This jurisdiction [to stay waste, etc.] has been so universally asserted and exercised by courts of equity that all of the legal remedies for waste have nearly fallen into disuse."

68a As to the doctrine of "balancing the equities," and the giving of damages by equity as a substitute for equitable relief see Chapter XI, *post*. As to preliminary injunctions see § 57, *post*.

69 Soltau v. DeHeld, 2 Sim. (N. S.) 132, 61 Eng. Rep. 291 (1851), the court saying at 151: "Now, it is true, that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance." 1 Ames, Cas. Eq. 555, n. 3.

70 Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (1892); 1 Ames, Cas. Eq. 578, quoting the Chancellor in Ross v. Butler, 19 N. J. Eq. 294 (1868), at 305, 306:—"I find no authority which will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise and dust that an additional factory, which adds a *little* to the com-

erty for manufacturing purposes in a county district, the surrounding properties being vacant, unimproved land, will not be

mon evil, would not be considered at law a nuisance, or be restrained in equity.''

In Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164 (1886), the carrying on of the business of a moulding and planing mill was held to be a nuisance interfering unreasonably with the plaintiff's enjoyment of his house, twenty-one feet away, because of noises which made it impossible to hear ordinary conversation, and because of smoke and cinders from the steam engine by which the machines were operated, though the smoke and cinders were largely eliminated by building a high smoke stack. The court said, referring to the claim that defendant's business was *per se* lawful, and a reasonable use of their property: ''We concede that the law will not interfere with a use that is reasonable. But the question of reasonable use is to be determined in view of the rights of others. Even a cooking stove may be so located and used as to make it a nuisance to the adjacent proprietor, as in Grady v. Wolson, 46 Ala. 381.''

With reference to the character of the neighborhood, it appearing that there were many other manufacturing plants there but not near enough to cause serious inconvenience to the plaintiff, the court said: ''. . . The location and surroundings are to be considered, for it is undoubtedly true that what constitutes a nuisance in one locality may not be in another, and we can fully accept the rule laid down in McCaffrey's Appeal, 105 Pa. 253: 'A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily hear some of the noise and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries.' ''

The court found that the character of the neighborhood gave the defendant no excuse for so interfering with the plaintiff's enjoyment. In answer to the argument that the plaintiff was precluded because he elected to reside in a noisy locality, the court said: ''If . . . the plaintiff knew of the nuisance and then went and took up his abode near it, he would not thereby be precluded from maintaining his action. A man is not to be precluded from building and living on his own land because the adjoining proprietor first erected a nuisance, which indeed was no nuisance till somebody went there to live. Hale v. Barlow, 27 L. Jour. C. P., 208; Commonwealth v. Upton, 6 Gray 473; Fertilizing Co. v. Hyde Park, 97 U. S. 659.'' The court then quoted with approval the extract from the opinion in Ross v. Butler, quoted above. See also Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925); State v. Atwood, 54 Ore. 526, 104 Pac. 195 (1909); Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992 (1913); Strachan v. Beacon Oil Co., 251 Mass. 479, 146 N. E. 787 (1925); Gavigan v. Atl. Ref. Co., 186 Pa. 604, 40 Atl. 834 (1898); Wallace Co. v. U. S. Cutlery Co., 97 N. J. Eq. 408, 128 Atl. 872 (1925), 98 N. J. Eq. 699, 130 Atl. 920 (1925).

a nuisance when such land is unaffected seriously in its use and enjoyment by the smoke, dust, stenches or other pollutions of the air caused by the manufacturing business. It will become a nuisance, however, when the surrounding lands are developed by the erection of homes and the development of orchards, orange groves, vineyards and other reasonable and proper modes of enjoyment which are unreasonably interfered with by the manufacturing business.[71] There must be an unreasonable interference with a present existing user of the neighboring property. No nuisance exists, and therefore the period of prescriptive user required to create an easement by prescription does not begin to run, until the neighboring property has been so improved that the user actually interferes with the existing actual enjoyment of that property.[72] Cases between riparian owners arising out of wrongful diversions or pollutions of a stream interfering with a potential future enjoyment of the stream are entirely different, as the law has established easements by natural right in the stream between riparian owners. The diversion or pollution is wrongful from the beginning in those cases, irrespective of the lower owner's actual user because it is a violation of his easement, and therefore the period of prescriptive user runs from the beginning of the pollution or diversion.[73]

It is sometimes argued, in criticism of the settled law, that an easement should arise against the vacant land in such cases, giving the right to continue the business as against the neighboring owner after the period of prescriptive user has elapsed, so that he cannot complain when he subsequently improves his property, the argument being that it is a great hardship that a lawful manufacturing business should be made unlawful and that the owner should suffer the loss arising from the discon-

71 Campbell v. Seaman, 63 N. Y. 568 (1876), the court saying: "It matters not that the brickyard was used before plaintiffs bought their land or built their houses (citing cases) . . . One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected." See quotation to same effect from Hulbert v. McKone, *supra* note 70, also Hulbert v. Calif. Portl. Cement Co., 161 Cal. 239, 118 Pac. 928 (1911).

72 Sturges v. Bridgman, 11 Ch. D. 852 (1879), and cases in preceding note.

73 See, *supra* note 28.

tinuance or removal of his business and the dismantling of his plant because of a subsequent development of the vacant property.[74] The only alternative would be to create another easement between neighboring owners as between owners on the banks of a stream, with no practical way of measuring the extent of the easement, giving the right to recover nominal damages at law and to secure an injunction in equity in case of any user which might interfere with some possible future use of the neighboring property by its owner, an entirely impossible and impracticable thing, which would interfere most seriously with the development of land through the creation by prescription of all sorts of encumbrances in the form of easements, a doctrine clearly contrary to public policy.

On the other hand it has been urged that the right to continue a nuisance should not arise by prescription where actual interference with the present enjoyment has existed for twenty years; that nonaction by the injured party should bar him for laches without affecting the title to his property, and that the cases sustaining the doctrine that a nuisance may become an easement by prescription are not conclusive.[75] But easements by prescription through violation of an easement for twenty years are numerous, and the law to that effect is everywhere settled. The "right to continue a nuisance" is created in those cases just as truly as in the cases we are now considering. The user must be wrongful in any case in which an easement arises by prescription, and it is difficult to see why the wrongful user violating a neighbor's right of enjoyment should differ in this respect from trespasses and interferences with easements. There is no support for any such difference in the cases.[76]

The seepage of sewage or other objectionable material through defendant's land to the plaintiff's property, dangerous to health and interfering unreasonably with the plaintiff's enjoyment, is an obvious nuisance which equity will restrain.[77] It is clear that interference with the owner's reasonable right of enjoyment is

74 (1899) 13 Harv. L. Rev. 142. See *contra* (1908), 22 Harv. L. Rev. 128.

75 Article by Mr. Lewis (1916), 47 U. of Pa. L. Rev. (O. S. Vol. 56) at 313 n.

76 See cases in notes in this and preceding sections treating of easements in streams and modifications thereof by adverse user.

77 See cases cited, 1 Ames, Cas. Eq. 612.

all that is involved. So the maintenance near the plaintiff's residence or place of business of sources of danger such as powder mills or magazines,[78] and hospitals for smallpox or other diseases easily transmitted[79] are nuisances which equity will enjoin if it appear that they constitute a real menace to the plaintiff, unreasonably interfering with the enjoyment and use of his property. It is very clear that no violation of a series of natural rights exists in such cases, other than the wrongful interference with the general right of enjoyment which is of the essence of ownership in all cases.

The drying up of neighboring lands by a municipality or water company through the sinking of many wells and pumping into a reservoir for public consumption such great quantities of water that the water table of the surrounding country is lowered, is a clear case of unreasonable interference with the reasonable rights of enjoyment and use of the adjoining property owners.[80] It is a mistake to regard the American cases as a departure from the common law rule that no easement by way of natural right exists in percolating or surface waters. That doctrine is the law everywhere in the United States, except in Louisiana and two or three other states where the doctrine of the civil law has apparently been followed.[81] The English cases

78 Heeg v. Licht, 80 N. Y. 579 (1880); Weir's Appeal, 74 Pa. 230 (1873); Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556 (1890).

79 Metropol. Asylum v. Hill, 6 App. Cas. 193, 196 (1881); Gilford v. Babies' Hospital, 21 Abb. N. C. (N. Y.) 159, 1 N. Y. Supp. 448 (1888).

80 Forbell v. City of New York, 164 N. Y. 522, 58 N. E. 644 (1900); Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141 (1897); Reisert v. New York, 174 N. Y. 196, 66 N. E. 731 (1903); Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663 (1902); Meeker v. East Orange, 77 N. J. L. 623, 74 Atl. 379 (1909); Bassett v. Salisbury Mfg. Co., 43 N. H. 569 (1862). See Walsh, Property (2nd Ed.), 635.

81 As to percolating waters: Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433 (1888); Bliss v. Greeley, 45 N. Y. 671 (1871); Ocean Grove Ass'n v. Comm'rs Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168 (1885); Roath v. Driscoll, 20 Conn. 532 (1850); Chatfield v. Wilson, 28 Vt. 49 (1855), and other cases cited, Walsh, Property (2nd Ed.), 632, n. 10.

As to surface waters: Barkley v. Wilcox, 86 N. Y. 140 (1881); Gannon v. Hargadon, 92 Mass. 106 (1865); Bates v. Smith, 100 Mass. 181 (1868); Bowlsby v. Speer, 31 N. J. L. 351 (1865), and other cases cited, Walsh, Property (2nd Ed.), 632, n. 10. Cases following the civil law doctrine that lower owners cannot interfere with the

in which injunctions against individuals or companies taking percolating water for public consumption were denied were cases in which no such unreasonable interference with adjoining property owners was involved.[82] Surely no one will claim that the maxim, *Sic utere tuo,* &c., does not prevail in England.

natural flow of surface waters and upper owners cannot change the natural flow of such waters to the material damage of the lower owner, are cited in the same note, including cases from Illinois, Pennsylvania, Michigan, Iowa and Alabama. In some of these the authority of the case is weakened on this point by such statements as in Nininger v. Norwood, 72 Ala. 277 (1882), that "Either may improve his own parcel, so long as he keeps within a just application of the maxim, *Sic utere tuo ut laedas non alienum.*" It is submitted that the application of that maxim is the only question that can properly arise in these cases, and so far as some of them seem to recognize easements of natural right between adjoining owners in surface waters they cannot be supported. The extent of such easements cannot be determined with any degree of precision, and their enforcement must necessarily bar reasonable improvements of adjoining lands and therefore be contrary to sound public policy.

82 In Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (1843), the defendant had sunk a coal pit on his own land about three-fourths of a mile from the plaintiff's well, and another somewhat nearer, reducing the well so that it was insufficient for plaintiff's purposes. That the sinking of these mines on the defendant's land was a reasonable use of his property, and that the damage to the defendant was *damnum absque injuria,* would be everywhere recognized in the United States. Criticism of some of the arguments used in this case by the court in Meeker v. East Orange, 77 N. J. L. 623, 74 Atl. 379 (1909), cited above, tends to create the impression that the American cases are departing from the English rule in these cases. Clearly the decision in Acton v. Blundell was in entire accord with the American cases, and the case would have been decided the same way in New Jersey or New York. In Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Rep. 140 (1859), the pumping of water from a well to supply the neighboring town of Croyden intercepted percolating waters some of which otherwise would have found their way to the plaintiff's stream, some distance away, but there was nothing to show any drying up of the stream or unreasonable interference with the plaintiff's right of enjoyment as would amount to a nuisance under the American cases. In these English cases it was decided, as in the United States generally, that no easement of natural right existed between neighboring owners in percolating or surface waters. The question of a nuisance because of unreasonable interference with the plaintiff's right of enjoyment was simply not before the court. The American doctrine is a very clear and simple application of the long-established common law of nuisance

Of the same nature and turning on the same doctrine are the cases of the unreasonable draining of surface and percolating water and the throwing of it in unreasonable quantity on a neighbor's land, in effect the transfer of the defendant's swamp to the plaintiff's premises.[83] It is settled law, except in the few states referred to above that no easement in surface waters exists between adjoining owners. Each may grade his land, fill depressions and change the natural flow of casual waters without liability for resulting damage to his neighbor. These are cases of *damnum absque injuria*.[84] Each may drain his land by ditches, though he increases the flow of surface and percolating water to his neighbor's property. Each must submit to such incidental damage as may follow from reasonable acts done in the improvement of his neighbor's property. But here as in every other relation between adjoining owners there must be no violation of the balance of reasonable user and enjoyment between the neighboring owners which will violate the doctrine *Sic utere tuo*, &c. Assembling surface and percolating water by ditches from a marshy place on the defendant's land and throwing it in unreasonable quantity on the plaintiff's property, transferring the marsh across the line, is a violation of the maxim, an unreasonable interference with the plaintiff's right of enjoyment. The cases of seepage of offensive matter to the plaintiff's land, above referred to, are closely akin to these cases.[85]

arising from unreasonable interference with a neighbor's right of enjoyment.

83 Miller v. Laubach, 47 Pa. 154 (1864); Kelly v. Dunning, 39 N. J. Eq. 482 (1885); Bedell v. Sea Cliff, 18 App. Div. 261, 46 N. Y. Supp. 226 (1897); Noonan v. Albany, 79 N. Y. 470, 475 (1880); Livingston v. McDonald, 21 Iowa 160 (1866); Adams v. Walker, 34 Conn. 466 (1867); Templeton v. Voshue, 72 Ind. 134 (1880). See N. Y. Const., Art. 1, p. 7, providing for drainage over neighbor's land on paying compensation. This amendment of the constitution was made necessary by the holding that an act so providing was unconstitutional. See People v. Henion, 64 Hun. 471, 19 N. Y. Supp. 488 (1892); Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303 (1900).

84 See note 81, *supra*.

85 See note 77, *supra*. The legal basis of liability in cases of contamination of waters percolating to the plaintiff's premises is sometimes said to be negligence, as in Ball v. Nye, 99 Mass. 582 (1868). Whether the contamination is intentional or negligent, liability necessarily results from unreasonable interference with the plaintiff's right of enjoyment. Haugh's Appeal, 102 Pa. 42 (1883); Collins v. Chartiers Gas Co., 139 Pa. 111, 21 Atl. 147 (1891), [escaping oil from pipe line]; Brown v. Illius, 27 Conn. 84, 93 (1858).

CHAPTER VIII

PUBLIC NUISANCES; EQUITABLE PROTECTION OF PUBLIC RIGHTS

§ 37. **Early Development.** Writs to restrain nuisances in the King's Court of the thirteenth century have been referred to heretofore.[86] A writ, the form of which appears in Fitz-Herbert's New Natura Brevium 185 D, prior to 1537, was directed to the mayor and his bailiffs of Oxford, ordering them to clean the streets and keep them clear of various forms of foulness dangerous to the public health. A case decided in 1587 restrained a tenant from building and maintaining a pigeon-house as a common nuisance.[87] In the report of Attorney General v. Richards (1795),[88] we find references made to the very few cases decided prior to that case in which purprestures (invasions of public rights of way or navigation by permanent structures) or other public nuisances were involved.[89] It is evident that equitable relief against public nuisances developed for the most part in the nineteenth century as modern law, paralleling the development of equity in private nuisance cases.[90]

86 Sec. 2, n. 18; 2 Holdsworth, Hist. Eng. Law 248.

87 Bond's Case, Moore, 238, No. 372, referred to in Mack, Revival of Criminal Equity (1903), 16 Harv. L. Rev. 390.

88 Excheq., 2 Anstruther, 603; 1 Ames, Cas. Eq. 615, Chafee, Cas. Eq. 441.

89 Reference is made to Glanvil, 1, 9, c. 11; Atty. Gen. v. Philpot, 8 Chas. 1; City of Bristol v. Morgan, cited by Lord Hale in his treatise, *De Portibus Maris,* ordering the abatement of purprestures on navigable streams. In 3 Atk. 750, 26 Eng. Rep. 1230 (1752), on a motion for an injunction against building a smallpox hospital, Lord Hardwick states that an information by the attorney-general is the proper remedy against a public nuisance, though the injunction was denied in that case.

90 See § 34, *supra.* Professor Chafee, Cases on Equitable Relief Against Torts, 439, 440, refers to decisions by Lord Eldon in the early part of the nineteenth century showing his reluctance to intervene in these cases, but finally accepting the jurisdiction. He also cites several early American cases showing the same hesitancy.

§ 38. **Purprestures and Other Public Nuisances.** Land owned and used by a state or municipality as a private owner, not for general public use such as highways or navigable streams, will be protected by injunction in equity against nuisances from unreasonable use of adjoining property exactly as private property will be protected against similar nuisances.[91] The usual public nuisance, which equity will restrain, is a purpresture, involving a structure encroaching on a highway or public street or interfering with navigation, or an interference in a continuous or recurring way with the comfort, peace, health or safety of the public. There is no question about the ending of purprestures by negative or mandatory injunction as the case may require,[92] the only uncertainty being as to whether equity will

[91] U. S. v. Luce, 141 Fed. 385 (C. C. Del. 1905), restraining a nuisance arising from the manufacture of oil and fertilizers from fish, interfering with the use of a United States quarantine station.

[92] In Atty. Gen. v. Williams, 174 Mass. 476, 55 N. E. 77 (1899), 1 Cook, Cas. Eq. 673, Chafee Cas. 445, an injunction was granted against erecting or maintaining a building on Copley Sq., Boston, in violation of a statute limiting the height of building on certain streets. The court said: "We hold that the statute gives rights in the nature of an easement over lands facing Copley Square, which easement is annexed to the square for the benefit of the public for whose use and enjoyment Copley Square was laid out, and that these rights are similar in their nature to rights in highways, in great ponds, and in the navigable waters of the commonwealth . . . The Attorney General, as a public officer, represents the public, and may bring all proper suits to protect their rights. The wrong alleged in the present case, if permitted, would work a permanent injury to the public . . . It is a purpresture which . . . is in the nature of a public nuisance, and in equity is to be dealt with as a public nuisance." See, also, Craig v. People, 47 Ill. 487 (1868); Southampton v. Scott, 91 N. J. Eq. 443, 110 Atl. 587 (1920); Lyon v. Columbia Water Power Co., 82 S. C. 181, 63 S. E. 884 (1909). Purprestures by structures extending into public streets will be ended by injunction where relief at law is not adequate. See § 35 (*4*), *ante*, and notes thereunder, also Walsh, Property (2nd Ed.), 707, n. 8, and 9.

Whether purprestures exist when structures are erected on the foreshore (beyond high water mark) on public navigable waters involves the relative rights of the owner of the upland and of the state in such land. Confusion has arisen from giving too literal effect to language of the courts. The English cases lay down the rule that title to the foreshore is in the Crown, primarily for public enjoyment of navigation, fishing and the like, but the rights of the owners of the upland to have access to the water as a public right of way are fully recognized and pro-

intervene before actual interference with the public enjoyment causing actual damage has taken place.[93] It is also well settled

tected. In Atty. Gen. v. Richards, *supra*, note 88, the structures complained of were restrained as purprestures because they unreasonably interfered with navigation, not merely because they were erected on land of the Crown. As to the relative rights of navigation in the public and the upland owner's rights of access see Orig. Hartlepool Co. v. Gibb, 5 Ch. D. 713 (1877). The title of the Crown as a *jus privatum* to the foreshore becomes, therefore, a shadowy thing of mere words, except as it exists for public rights of navigation, fishing and the like. In the United States, though some statements have been made to the effect that the state owns such land as a *jus privatum* superior to the rights of the public and of the upland owner [see Thompson, Title to Land Under Navigable Waters (1921) 21 Col. L. Rev. 680] the law is well settled everywhere that the state's title is subject to the public rights of navigation, fishing and similar uses (or more accurately exists solely for such public uses) and is also subject to the rights of the owner of the upland to have access from his land to the public water. The upland owner may erect docks on the foreshore in order more adequately to make use of the water by the public for purposes of navigation, fishing and other public uses. In other words such improvements on the foreshore are not purprestures unless they actually interfere materially with the use of the stream or arm of the sea as a public thoroughfare, amounting to public nuisances. People v. Mould, 37 App. Div. 35, 55 N. Y. Supp. 453 (1889), 188 N. Y. 74, 80 N. E. 665 (1907); Barnes v. Midland &c. R. Co., 193 N. Y. 378, 85 N. E. 1093 (1903); Tiffany v. Oyster Bay, 234 N. Y. 15, 136 N. E. 224 (1922). See cases cited, Walsh, Prop. (2nd Ed.), 723, n. 10, 11. There seems to be no real difference between the English and American cases. Title to the foreshore is in the state, but as a practical matter only for public uses of navigation, fishing, &c. The upland owner has rights in the foreshore in the nature of easements, exactly analogous to the rights of an abutting owner on a public street. See Thompson, Title to Land under Navigable Waters (1921), 21 Col. L. Rev. 680 and also note (1920), 30 Yale L. Jour. 58; (1916) 30 Harv. L. Rev. 171; (1921) 34 Harv. L. Rev. 396.

93 See preceding note. Has the abutting owner on a street immunity against a purpresture which does no damage in that it does not interfere with traffic on the street? Has he any right corresponding to the upland owner's right to erect and maintain a dock? Clearly not. Maintaining a dock is essential to the right of access from navigable waters, but no such reason exists to justify building vestibules, bay-windows or the like into the street, even though no interference with the public use of the street results. See First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144 (1902); State v. Kean, 69 N. H. 122, 45 Atl. 256 (1897); People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N. E. 864 (1915), [bay window]; Hibbard &c. Co. v. Chicago,

everywhere that equity will intervene to protect the public from any business or other regular course of conduct seriously affecting the safety, health or physical well-being of the public.[94] Nuisances involving unreasonable interferences with the use and enjoyment of public property not directly used by the public are restrained in equity exactly as private nuisances are restrained and for similar reasons. The state or city is protected like any other property owner. The principle back of the restraint of purprestures is also based on the protection of the property rights of the state or municipality in parks, streets, highways or navigable waters.[95] But the principle of protecting the public from wrongful interferences with the actual enjoyment by members of the public of public rights of way, parks and other public places open to all, is the real basis of liability at law and relief in equity in these cases. In other words the wrong punishable as a crime at law is something more than a mere interference with the use of property or property rights in the state or city as owner; it is the injury to the public by interference with essential rights of its members in the actual enjoyment of public ways and places which is the essence of the offense against the public.[96] Public nuisances which are pun-

173 Ill. 91, 50 N. E. 256 (1898), [awning]; Acme Realty Co. v. Shinasi, 215 N. Y. 495, 109 N. E. 577 (1915), [municipality may order removal of such encroachments when necessary, though erected with its consent]; Valparaiso v. Bozarth, 153 Ind. 536, 55 N. E. 439 (1899).

94 Atty. Gen. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361 (1882), [injury to the public health]; Atty. Gen. v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749 (1899); Baltimore v. Board of Health, 139 Md. 210, 115 Atl. 43 (1921); Pine City v. Munch, 42 Minn. 342, 44 N. W. 197 (1890); Atty. Gen. v. Hunter, 16 N. C. 17 (1826).

95 See note 92, *supra*.

96 Atty. Gen. v. Jamaica Pond Corp., *supra*, note 94, the court emphasizing the interference with the public rights of fishing, boating, bathing and other like rights in one of the great ponds which in Massachusetts belongs to the public. See cases, in note 93, *supra*, it being clear that the technical *jus privatum* of the state or municipality in public waters or land thereunder, streets, parks and other public places is a mere abstraction except as it expresses the rights of enjoyment of the general public in such public property. It follows that the anti-social interference with these rights of enjoyment in the general public rather than violations of the technical property ownership of the state or municipality, is the true basis of legal and equitable action against public nuisances of this kind.

ished at law and restrained in equity because they affect the health, safety and physical comfort of the public involve no violation of a property right, and the reasons for equitable relief in these cases is necessarily the protection of public or social rights, without even the pretense of protecting property rights. The first step was taken in cases of purprestures and similar interferences with public property rights, but the real wrong was anti-social interference with essential public rights of enjoyment, and protection of state or municipal property was merely incidental, the connecting link by which equitable relief in these cases grew out of relief in cases of private nuisances. In this way the protection of public or social rights by injunction in equity has become established in cases of nuisances involving the public health, safety and physical well-being.

The later cases have extended the doctrine to the restraint of nuisances involving serious injury to public morals. Here equity approaches very closely to the exclusive territory of the criminal law. It has been a fundamental doctrine of equity that an injunction restraining a criminal act will never be given merely because the act would be a crime. The protection of the public from crimes by punishment under the criminal law has always been the normal and usual means by which organized society guards against the anti-social conduct of its members. The question of equity's interposition in these cases is further complicated by the constitutional requirement of trial by jury in law cases. A review of the leading modern cases will best show how the problem is being solved.

§ 39. Protection of Social Rights in Equity. That equity will not enjoin an act merely because it is a crime is illustrated by People v. Prouty.[97] Prouty had been found guilty of contempt for violating a decree of divorce against him which forbad either party to marry again within the time prohibited by the Illinois statute. That statute forbad the marriage of either party to a divorce within one year, or a party divorced for adultery within two years, and provided a penalty of imprisonment for any violation. On appeal Prouty was discharged. The sole purpose of the decree forbidding the defendant to marry

[97] 262 Ill. 218, 104 N. E. 387 (1914), 1 Cook, Cas. Eq. 670.

again within a year was to prevent violation of this penal statute. The court held that the decree forbidding such marriage was absolutely void as the trial court had no power to enjoin an act merely because it would be a crime. In Commonwealth v. Smith,[98] an injunction was sought against the Commissioners of Fairmount Park to compel them to rescind a resolution permitting baseball on Sundays in the Park and to restrain them from permitting such games on Sundays, under an old statute of 1794 which forbad public games on Sunday. The court dismissed as immaterial the question whether or not such games were technical violations of the statute and therefore crimes. It was found as a fact that the playing of the games did not constitute a nuisance, public or private. The court refused an injunction against such games merely because they were crimes. "It is well settled that a bill will not lie having for its sole purpose an injunction against the mere commission of a crime, as is the case here. . . . A public nuisance is not involved in this proceeding, for the court below has so found, and, for the reasons stated, its finding is conclusive."

Before equity will intervene the specific reasons therefor must be shown. If such reasons exist an injunction will issue, and it will be quite immaterial whether or not the act enjoined happens to be a crime. In the above case, for instance, if the ball games had been found to be a nuisance, unreasonably interfering with the peace and comfort of the immediate community, an injunction would have been granted.[99] In Commonwealth v. McGovern,[100] the use of property by the owner for the purpose of a prize fight was restrained as a public nuisance, a menace to

[98] 266 Pa. 511, 109 Atl. 786 (1920), 1 Cook, Cas. Eq. 681.

[99] See cases in notes following which restrain public nuisances though punishable at law as crimes. In *In re* Debs, 158 U. S. 564, 15 Sup. Ct. 900 (1895), Judge Brewer said: "But when such interferences appear [viz., with rights of property or of a pecuniary nature] the jurisdiction of a court of equity arises, and it is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus in Crawford v. Tyrrell, 128 N. Y. 341 [28 N. E. 514 (1891)], an injunction to restrain the defendant from keeping a house of ill-fame was sustained, the court saying . . . : 'That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action . . . for an injunction . . .'"

[100] 116 Ky. 212, 75 S. W. 261 (1903).

public morals, and a danger to public safety by causing an assembly of the lawless element. The court intimates that the principals and their managers might not be enjoined because the processes of the criminal law would be adequate against them. In State ex rel. Crow v. Canty,[101] the owners of property were restrained from using it for a bull fight, but the court refused to enjoin the principals. Three of the judges stated that the principals should also be restrained. In Carleton v. Rugg,[102] Judge Knowlton said: "The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested." There seems to be no good reason, however, why the principals to a threatened nuisance, as in the prize fight and bull fight cases, should not be enjoined from taking part in such an exhibition in any place within the state. The same danger to the public would be involved irrespective of the particular city or location within the city where the exhibition might be held. It is difficult to see what "rules relating to property" Judge Knowlton had in mind. It is clear that an advertised series of exhibitions of a lewd and repulsive type in different cities constituting a serious menace to public morals should be enjoined though the exact locations of the theaters or halls in which they are to be held are left for local announcement later. The danger to the public is not modified one way or the other by the announcement of such locations. Equity intervenes in these cases of actual or threatened public nuisances because preventive relief by injunc-

101 207 Mo. 439, 105 S. W. 1078 (1907). In State v. Uhrig, 14 Mo. App. 413 (1883) the Missouri court sustained a demurrer to an action brought to restrain the operation of an unlicensed dramshop as a public nuisance because the jurisdiction of equity should not be extended to restrain a crime which is a public nuisance merely because of injury to public morals. State v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907), seems to have overthrown this case as law.

102 149 Mass. 550, 22 N. E. 55 (1889).

tion is more effective than the show and uncertain processes of the criminal law after the wrong has been committed and prevention of the threatened public injury, the extent of which cannot be accurately foreseen, is better than punishment after the harm is done, just as prevention of private nuisances is better than damages.[103] The principle of equitable protection of public interests of a purely social kind without any element of property rights is fully established by the cases enjoining nuisances affecting the health and physical well-being of the public. Nuisances involving public morality and decency are similar violations of the criminal law and subject to like penalties. Surely the same reasons exist for preventive relief in equity in these as in cases involving the physical well being of the public. Courts of equity as well as courts of law are part of the governing body of the state, the judicial division of the state government. Where the preventive form of relief which equity gives is more effective to protect the public interest in these cases of public

103 Thus in Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641 (1885), the court said: "Such nuisances (obstructions of highways, &c.) are detrimental to the public because they obstruct travel and impede navigation. But the damages to the public are no more susceptible of computation than the injuries to the public by the unlawful maintenance of a saloon." In Atty. Gen. v. Jamaica Pond &c. Corp., 133 Mass. 361 (1882), *ubi supra*, the court said referring to the nuisance as a menace to the public health: "Neither of these remedies [viz., indictment and abatement by the Board of Health] can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond and land and the underground currents to the condition in which they are now . . . The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

In Stead v. Fortner, 255 Ill. 468, 92 N. E. 680 (1912), the court said: "This court has never regarded a criminal prosecution which can only dispose of an existing nuisance and cannot prevent a renewal of the nuisance, for which a new prosecution must be brought, as a complete and adequate remedy for a wrong inflicted upon the public. . . . The maintenance of the public health, morals, safety and welfare demands it and damages to the public are not susceptible of measurement in money; and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the state is unable to enforce the law or protect its citizens from public wrongs." See also People ex rel. Dyer v. Clark, 268 Ill. 156, 108 N. E. 994 (1915); Southampton v. Scott, 91 N. J. Eq. 443, 110 Atl. 587 (1920).

nuisances, there is no good reason why it should not be had. Statutes have been enacted in several states declaring places of prostitution or for the illegal sale of intoxicating liquors to be nuisances and providing for their suppression by injunction in equity. In Hedden v. Hand,[104] such a statute was held unconstitutional in New Jersey as turning over to equity jurisdiction over crimes and depriving the defendants of the rights of presentment by a grand jury and subsequent trial by jury guaranteed by the Constitution. The overwhelming weight of authority in other states is against this position. In one of the cases above referred to where an injunction was granted without the aid of such a statute one of the judges said, very pointedly hitting the weakness of the trial by jury argument: "A man charged with the commission of a crime has a constitutional right to a trial by jury, but a man who has not yet acted, but who merely proposes to commit an act, which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act, in order that he may thereafter enjoy the constitutional right of trial by jury."[105] Carleton v. Rugg, quoted from above, is a leading case upholding the general view that such statutes are constitutional and must be enforced. Other cases appear in the notes.[106]

[104] 90 N. J. Eq. 583, 107 Atl. 285 (1919).

[105] Valliant, J., in State v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907).

[106] In Respass v. Commonwealth, 131 Ky. 807, 115 S. W. 1131 (1909), the court said: "The state is as much interested in restraining those things which destroy the character of its people as in those things which destroy their health or personal security. . . . If it may protect its citizens by injunction from such a use of property as would breed a pestilence among the people, upon what principle can it be maintained that it may not by injunction prevent that use of property which, while it does not destroy the body, destroys the character." See Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (1887); Williams v. State, 150 Ga. 480, 104 S. E. 408 (1920); State v. Ellis, 201 Ala. 295, 78 So. 71 (1918); Brown v. Powers, 146 Iowa 729, 125 N. W. 833 (1910); Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914 (1895); State v. Wheeler, 131 Minn. 308, 155 N. W. 90 (1915); State v. Kearns, 304 Mo. 685, 264 S. W. 775 (1924); State v. Shain, 297 Mo. 369, 248 S. W. 591 (1923); Matter of Love, 205 App. Div. 363, 199 N. Y. Supp. 530 (1923); Farley v. Dreeland, 151 App. Div. 456, 135 N. Y. Supp. 869 (1912); State v. Stoughton Club, 163 Wis. 362, 158 N. W. 93 (1916). See Note, 5 A. L. R. 1474, the conclusion therein being, that excepting Hedden v. Hand, *supra*, note 104, "the

These statutes are simply the expression of the law-making power that continuous nuisances involving serious danger to public morality and serious violation of the public sense of decency be restrained and abated by injunction in equity, overcoming the reluctance of conservative courts by positive and controlling law. The *power* of the courts to act in these cases with or without such statutes is undoubted, and, as pointed out above, such action is expedient and desirable though no statute exists. There is no assumption of jurisdiction over crimes as such or interference with the criminal law and its enforcement in such cases. The court enjoins the continuance of the acts constituting the nuisance; it leaves to the criminal law punishment for past acts.[107] Violation of the injunction will bring

courts have uniformly sustained the constitutionality of statutes conferring upon courts of equity power to abate public nuisances although the acts constitute a crime and no property rights are involved."

107 See cases note 99, *supra*. In Minke v. Hopeman, 87 Ill. 450 (1877), the defendant had been tried and acquitted of the criminal charge. The court said: "We do not regard this fact of sufficient importance to deprive a court of equity of jurisdiction. On the trial of an indictment, the defendant would be entitled to the benefit of a reasonable doubt, and although the evidence might clearly preponderate against him, yet the jury might acquit. . . . The bare fact that the statute gives a remedy by indictment, does not deprive the court of its equitable powers in this class of cases." See also U. S. v. Reinking, 283 Fed. 855; Stead v. Fortner, 255 Ill. 468, 99 N. E. 680 (1912); Murphy v. United States, 272 U. S. 630, 47 Sup. Ct. 218 (1926), and cases cited in note 106, *supra*. As tending to support the position taken in Hedden v. Hand, note 104, *supra*, that equity will not act to restrain criminal acts merely because of damages to public morals, see State v. O'Leary, 155 Ind. 526, 58 N. E. 703 (1900); State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935 (1909). In Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, (N. Y. 1817), 1 Cook, Cas. Eq. 667, the court refused to enjoin the defendant from engaging in banking in violation of the Banking Law. The attitude of the early cases is clearly expressed in this case: "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of the court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it. . . . But it is an extremely rare case, and may be considered, if it ever happens, as an anomaly, for a court

punishment for the contempt involved in a summary way. If the act is a violation of the criminal law, punishment therefor after trial by jury is not barred by punishment for the contempt, though as a practical matter such trial and punishment may not be necessary or expedient. These cases differ in no respect from other cases where the act constituting a contempt happens to be also a violation of the criminal law. The two jurisdictions are as distinct as are civil actions in tort for damages and criminal prosecutions where the same act constitutes the tort and also the crime.

The argument in Hedden v. Hand, *supra,* that statutes might, if allowed, extend the remedy by injunction in equity to crimes of all kinds, in effect supplanting the law of crimes and depriving defendants of jury trial, applies in cases where no public nuisance or other occasion for equitable relief exists and where the remedy by injunction is provided for by statute against acts merely because they are crimes. No doubt the entire field of the law of crimes has for its sole purpose the protection of public and social interests. But equity's protection of public interests is limited to cases of public nuisances as outlined above, including any continuous business or activity which will be a continuous or indefinitely repeated menace to the public health and safety, or to the public morals or public sense of decency, and other cases in which prevention by equitable action is better than punishment. Any act outside of these limits cannot be brought within the jurisdiction of equity by statute, not because the law-making power may not extend the field of equity—such statutory extensions have been frequent as we have seen,[108]—but because punishing a defendant for contempt based on an act enjoined merely because it is a crime is in effect punishing him for a crime by order of a court without trial by jury, in direct conflict with the constitutional guaranty of trial by jury. The

of equity to interfere at all, and much less preliminarily by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy."

108 Instances are statutes in many states extending equitable jurisdiction to remove cloud on title; giving equity power to act *in rem;* providing for specific performance of arbitration contracts; providing for specific performance of agricultural cooperative marketing contracts. These are referred to and discussed under the appropriate headings heretofore or hereafter.

proper application of this principle will limit such statutes to the natural field of equitable action, viz., to cases where public rights are more adequately protected by prevention than by punishment.[109]

Protection of the public interest is the purpose of injunctions against labor organizations and leaders to prevent railroad strikes as conspiracies against interstate commerce and the moving of the mails.[110] The property right of the federal government in the mails, though one of the reasons given for equitable intervention in these cases, was not the controlling reason. Whether equity will interfere to restrain violations of statutes forbidding the practice of medicine or practice by chiropractors, or the like, without a license, has been decided both ways, the tendency being not to interfere because the penal remedy adequately protects the public. The danger to the public health from practice by unauthorized persons is not regarded as making such conduct a public nuisance which equity should enjoin.[111] On the other hand zoning ordinances are freely enforced by injunction, the public interest being more adequately protected

109 That there must be proof of a nuisance as distinguished from a mere crime, see State ex rel. Alton v. Salley, 215 S. W. 241 (Mo. 1918). That equity has no power to enforce the criminal law as such, interfering in these cases only to give more adequate relief in protection of property rights and rights of the public as against public nuisances, see State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk, 269 Mo. 389, 190 S. W. 877 (1916); State ex rel. Kleinschmidt v. Jones, 277 Mo. 71, 209 S. W. 876 (1919).

110 In re Debs, 158 U. S. 564, 15 Sup. Ct. 900 (1894). In Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921), a state statute forbidding the use of injunctions in strike cases was held to be unconstitutional.

111 Dean v. State of Georgia, ex rel. Anderson, 151 Ga. 371, 106 S. E. 792 (1921). People v. Chiropractor's Ass'n, 302 Ill. 228, 134 N. E. 4 (1922). State v. Johnson, 27 N. M. 20, 188 Pac. 1109 (1920). In State v. Anderson, 6 Tenn. C. C. A. 1 (1915), an injunction restraining such practice without the license required by law was granted because of the danger to the public health, the penal remedy being regarded as inadequate. Persistently repeated violations of a penal statute prohibiting the establishment of insane asylums without a license were enjoined in State ex rel. Jackson v. Lindsay, 85 Kan. 79, 116 Pac. 207 (1911). Erection of structures without required license will not be enjoined. Whitmore v. Brown, 102 Me. 47, 65 Atl. 516 (1906). Operation of Taxicab Co. without license is not a nuisance *per se*, Hefferon v. N. Y. Taxicab Co., 146 App. Div. 311, 130 N. Y. Supp. 710 (1911).

by specific relief than by penal action, just as specific enforcement of a restrictive covenant in a deed is superior to damages.[112]

§ 40. **Nuisances Both Public and Private.** If a public nuisance so interferes with the right of a person to enjoy his property or with his easement or other incorporeal right that it is a private nuisance to him, he may maintain an action for an injunction and other relief exactly as in other cases of merely private nuisances. The fact that it is also a public nuisance punishable as a crime and subject to be enjoined in equity in an action brought in behalf of the public has no effect whatever upon the right of such person to maintain his action. If his right to reasonably use and enjoy his property has been unreasonably interfered with, or his right of way, of access, or other easement has been interrupted by the same wrongful conduct which amounts to a public nuisance, he may maintain his action for an injunction and other remedy irrespective of an action brought in behalf of the public; if there is no such interference with his private property rights he can maintain no action merely because he can prove individual damage to himself arising from the obstruction of a public street or other public nuisance.[113] He suffers such damage as a member of the public,

112 New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924); Carbajal v. Vivien Ice Co., 158 La. 784, 104 So. 715 (1925).

113 Action by private person allowed where act was a tort as to him. Wakeman v. Wilbut, 147 N. Y. 657, 42 N. E. 341 (1895); Ackerman v. True, 175 N. Y. 353, 67 N. E. 629 (1903); Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22 (1886); District of Columbia v. Totten, 55 App. D. C. 312, 5 F. (2d) 374 (1925). See note 116, *post*.

Action by private person not allowed where the public nuisance was not a tort as to the plaintiff individually:—Adler v. Met. St. R. Co., 138 N. Y. 797, 33 N. E. 935 (1893); Brainsed v. Conn. Co., 7 Cush. (Mass.) 506; O'Brien v. Turner, 255 Mass. 84, 150 N. E. 886 (1926); Bigelow v. Hartford Co., 14 Conn. 565; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305 (1903); Decker v. Evansville Co., 133 Ind. 493, 33 N. E. 349 (1893); Curtis v. Charlevoix Golf Ass'n, 178 Mich. 50, 144 N. W. 818 (1913); Bouquet v. Hackensack Water Co., 90 N. J. L. 203, 106 Atl. 373 (1919); Edmunds v. Duff, 280 Pa. 355, 124 Atl. 489 (1924). See long list of cases, 46 C. J. 728, n. 44.

In New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924), a business carried on in violation of a zoning ordinance restrained as a public nuisance, may be restrained at suit of a private person who suffers a special damage not common

and the only remedy in equity is by an action in behalf of the people brought by the Attorney General, as in the cases heretofore discussed and cited in this chapter. In some states statutes provide for the bringing of actions by individual citizens in behalf of the public to enjoin certain public nuisances, particularly disorderly houses, gambling places and resorts for the illegal sale of liquor, irrespective of whether the plaintiff suffers such special damage as would make the nuisance private as to him.[114] These actions are brought in behalf of the public exactly as when brought by the Attorney General.

Much vagueness and some error in the cases would be avoided if all the courts should recognize and express clearly the simple test expressed above in applying the law in cases of actions by private persons to restrain nuisances which are private as to such persons while at the same time public because of wrongful interference with public rights. This situation is analogous to the case of a tort which is also a crime, and should present no difficulty, the remedy of the public and the civil remedy in tort being entirely distinct. The difficulty arises from disregarding the basic principle and attempting to distinguish the cases in which the private person may sue as cases in which he suffers special damage differing from the damage suffered by the general public, differing in kind, not merely in degree.[115] If this is

to all. "In such instance the nuisance is both a public and a private one, and it is its private character which gives the cause of action to the individual." A good illustration of a nuisance which may be public and private at the same time is found in Carbajal v. Vivien Ice Co., 158 La. 784, 104 So. 715 (1925), where an ice manufactory erected and operated in violation of a zoning ordinance might be held to be a public nuisance and be restrained as such because of the superiority of the equitable remedy, and at the same time the plaintiff could maintain his action for an injunction because the operation of the manufactory was a private nuisance to him, interfering unreasonably with his reasonable right to enjoy his property.

114 Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641 (1885); Davis v. Auld, 96 Me. 559, 53 Atl. 118 (1902); Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55 (1889); Chase v. Revere House, 232 Mass. 88, 122 N. E. 162 (1919); Spence v. Fenchler, 107 Tex. 443, 180 S. W. 597 (1915); Pompano Horse Club v. State, 111 So. 801 (Fla. 1927).

115 As illustrating this tendency to state the law, see statement in 46 C. J. 732, § 312 (b) that an individual to obtain relief against a public nuisance "should show that he has suffered or will suffer some special injury other than that in which all the general public share

applied in practical effect as allowing such actions only when

alike, and, as a general rule, within the limitations noted hereinafter, the difference between the injury to him and the injury to the general public must be one of kind and not merely of degree.'' This accurately reflects the language of many of the long list of cases cited thereunder, notes 52 and 53. Then follows, as a limitation upon this rule, that it does not apply where the nuisance is both public and private at the same time, in which case the individual may recover his damages irrespective of whether they differ in kind or degree from the damages suffered by the community generally. An analysis of the cases demonstrates that this so-called ''limitation'' upon the rule is the rule itself. The individual plaintiff's right, protected by injunction in equity, is either his reasonable right to enjoy his property, or his right to use his easement of way, of access or other incorporeal right, which the public nuisance interferes with. The fact that it is a public nuisance, punishable by indictment and subject to injunction in equity at suit of the Attorney General or other public officer in behalf of the public, in no way bars his individual action. Actions at law for personal injuries arising from public nuisances are also unaffected by the fact that the nuisance is punishable as a crime and subject to restraint in equity at the suit of the public. The principle is well expressed by the court in Wesson v. Washburn Iron Co., 95 Mass. 95, 103 (1866), quoted from in 46 C. J. 735, n. 77 (a). ''The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused by individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience or annoyance for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause.'' To same effect, Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514 (1891). In Swain v. Chicago &c. R. Co., 252 Ill. 622, 626, 97 N. E. 247 (1911), the court illustrated this point as follows: ''If a trench be dug across a public street, every person in the community who has occasion to use the street will be delayed and inconvenienced. . . . One person might be delayed only a few seconds, while another, traveling by a different mode of conveyance, might be delayed much longer, and the

such damage arises from violations of the plaintiff's private right of enjoyment of his property or his easement or other incorporeal right, as is usually the case, the result reached is sound, though the danger of error is always present in such statements of the law.

nature of the business being done might be such that in one case the damage might be nominal while in another it might be considerable, but in all these cases the damages would differ only in degree and not in kind; but if another person, in attempting to use the highway in the exercise of reasonable care, falls into the trench and receives a personal injury, or if his horse should fall into the ditch and receive an injury, clearly an action would lie for the special damage to his person or his property. . . . It will be found upon a careful examination of the cases which sustain the right of an individual to maintain an action for an injury from a public nuisance, that there is some special and particular injury either to his personal property or established business, and that the recovery is sustained on the ground that his personal and individual rights, other than his right to use the highway, have been invaded."

See list of cases, 46 C. J. 735, 80 (2, 3) &c. to (11), showing in each case injury to property rights of the plaintiff giving him a cause of action irrespective of whether a public nuisance existed or not. Fessler v. Town of Union, 67 N. J. Eq. 14, 56 Atl. 272 (1903), illustrates this point.

CHAPTER IX

EQUITABLE PROTECTION OF BUSINESS AND SIMILAR RIGHTS OF SUBSTANCE

§ 41. Is Equitable Protection Limited to Property Rights? The development of equity in the field of tort has been mainly in the protection of property rights as against waste, trespass and nuisance; the property rights protected, usually in land, have been property rights in the strict sense, legal rights of ownership in physical things, including present rights of possession, future rights and purely incorporeal rights of enjoyment by way of easement or profit *a prendre*. Even this narrow field of equitable relief has developed, for the most part, during the last century and a half.[1]

Property in its broader sense unquestionably includes incorporeal things of value which are not interests, present or future, in physical things. Choses in action including stocks, bonds, notes, bills, accounts and the like, together constitute a very large part of the wealth of modern man.

Another broad class of incorporeal things of value includes copyrights, patents, trade secrets, trade names, trade-marks and the right to make profits by carrying on business. These may be classed together as business rights, since the practical value of copyright is in the profits from publishing and selling copies; of patents is in the manufacture and sale of the patented articles; and trade secrets, trade names and trade-marks are of value only in connection with the carrying on of the trade or business to which they are related. This chapter deals with the development in equity of relief against wrongs committed or threatened against business rights. Copyrights and patents are universally recognized as property, subject to transfer, inheritance and the incidents generally of intangible property. Trade secrets, trade-marks and trade names are simply incidents of the

[1] See Chap. VI and Chap. VII, *ante*.

business with which they are identified, and their protection is part of the law protecting the right to do business. Whether any or all of these rights are property or personal rights is a matter of terminology and classification about which different views have been held based on valid reasons. In any event there is no doubt that they are rights of substance having values which may be measured, like rights in tangible property, in terms of money.

Purely personal rights differ in that their violation involves injuries to the person, and the damages recovered therefor result from such personal injuries rather than from injuries to rights in tangible property or to rights of economic value of the same general nature which business rights undoubtedly are. There is no reason why specific relief in equity should not be given in these cases, where damages at law would be inadequate, as in cases of waste, trespass and nuisance. Actually, as the sections following establish, relief in equity has very largely taken over the entire field of protection of business rights. It is obvious that damages at law is an inadequate remedy in these cases. A man's right to carry on his business, on which his income and livelihood usually depend, cannot be adequately protected by recovering damages from time to time against wrongdoers who tortiously deprive him of this right in whole or in part. A man could not successfully live on such damages recovered in repeated suits. The remedy in equity enjoining the wrong and giving damages up to the time of the trial settling the controversy in a single action, is so clearly superior to repeated suits at law for damages, that equity intervenes in these cases as a matter of course, with little or no discussion in the cases of why the remedy at law is inadequate.

Does equity limit its relief to protection of rights in physical property, real and personal, and to protection of rights of substance? The rule has been generally laid down in the books and cases that equity will never interfere to protect purely personal rights. Many of the situations discussed in this chapter involve a consideration of this general doctrine, and will help to arrive at an understanding of what lies back of it, historically and as a matter of justice and expediency.

§ 42. Copyright. The author of a novel, poem, play, textbook or treatise, or any similar composition has, under the com-

mon law, a right of property in the composition as a thing of value created by him. This value exists entirely in the right to sell copies of the work and to realize profits from such sales.[2] But the earlier idea of a common law copyright arising from ownership by the author of the composition as his private property was almost completely nullified by the development of the doctrine that a general publication, making the composition available to the general public, was a dedication to the public, eliminating the author's exclusive right of publication except as it was preserved by statutory copyright.[3] Therefore the author of a literary composition of any kind must have it copyrighted under the statute to protect his property right in it from destruction by dedication to the public through its first publication. When the statutory period has elapsed and the statutory copyright has expired the common law property in the composition is not revived; it was ended by dedication to the public in the original publication, except as it was preserved for a limited time by the statutory copyright.[4]

[2] See early cases cited 1 Ames, Cas. Eq. 659; Rogers, History of Literary Property (1911), 5 Ill. L. Rev. 551; Rogers, Some Historical Matter Concerning Literary Property (1908), 7 Mich. L. Rev. 101; Note (1922) 35 Harv. L. Rev. 600; (1922) 22 Col. L. Rev. 182.

As to origin of copyright, see *post* note 4.

"Every new and innocent product of mental labor, which has been embodied in writing, or some other material form, while it remains unpublished, is the exclusive property of its author, entitled to the same protection which the law throws around the possession and enjoyment of other kinds of property." Vice Chancellor Van Fleet in Aronson v. Baker, 43 N. J. Eq. 365, at 367, 12 Atl. 177, at 178 (1888).

In Palmer v. DeWitt, 47 N. Y. 532, at 539 (1812), the court expressed the principle as follows: "Until published, the work is the private property of the author, wherever the common law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to such rights as the author may have secured under copyright laws, and they can have no force or give any rights beyond the territorial limits of the government by which they are enacted."

[3] See preceding note.

[4] Professor Holdsworth [6 History of Eng. Law, 362–379; Press Control and Copyright in the 16th and 17th Centuries (1920), 29 Yale L. J., 841–858], traces the origin and early development of copyright. He shows that the idea of copyright as literary property grew up with the exercise of control over the press through the Stationers' company, which was given larger powers of supervision and control over the business of printing and pub-

This common law property right in the composition before publication enables the author to obtain an injunction restraining any unauthorized publication by another.[5] If the composition is of real value for the purpose of future publication and sale, the injunction operates to preserve the author's right to profits from sales of copies thereafter under the protection of the statutory copyright which he may secure at any time before publication.[6] It is clear that an injunction, with damages or an accounting for prior sales, is the only adequate remedy. Damages, the sole remedy at law, involving repeated suits from

lishing. A printer or publisher was required to register with the company all books printed or published by him unless they were specially authorized by the Crown. This registry gave him a clear title to the book as literary property, which was protected against infringers, and was regularly transferred and dealt with as his property, having, apparently, perpetual duration. State control over printing and publishing, which continued until a few years before the first Copyright Act of 1709, gave specific remedies for infringements or violations of the printer's or author's copyright, creating the impression that the right was based on grants from the state rather than upon a common law property right in a thing of value created by its owner.

Professor Holdsworth refers to Millan v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769), and Jeffreys v. Boosey, 4 H. L. C. 815, 10 Eng. Rep. 681 (1854), the first case holding copyright was a common law right of property not dependent upon a grant by the state, and the majority of the judges taking the same view in the second case. In Donaldson v. Beckett, 2 Bro. P. C. 129, 1 Eng. Rep. 837 (1774), also contained in report of Miller v. Taylor, 4 Burr. 2303, at 2408, 98 Eng. Rep. 201, at 257, the English law was settled to the contrary, establishing the doctrine that the Copyright Act of 1709 alone protected copyright after that act took effect. That this is also the law in the United States, see Holmes v. Hurst, 174 U. S. 82, at 84, 19 Sup. Ct. 606, at 607 (1899), per Brown, J., quoted from Nims, Unfair Competition (2d Ed.), 508 n. 1a.

Professor Holdsworth says (6 Hist. Eng. Law 379): "To suppose that copyright depended solely on royal patents or on these special remedies, is to ignore the manner in which the Stationers' company had, without any reference to these patents or these remedies, built it up on the basis described by Erle, J. [Jeffreys v. Boosey, *supra*], as 'the most elementary principles of securing to industry its fruits, and to capital its profits.'"

[5] Palmer v. DeWitt, 47 N. Y. 532 (1872); Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. Supp. 311 (1921); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912); Tompkins v. Halleck, 133 Mass. 32 (1882); Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263 (1912).

[6] See preceding note.

time to time, difficulty of proof, and giving no remedy for constant interference not easily proved with the profits to which the author is entitled from his work, is so obviously inadequate that the remedy in equity has practically taken the place of this remedy at law. After the copyright has been secured under the statute equity intervenes to protect the author's rights for exactly the same reasons.[7]

If the composition is of no real value for publication and sale of copies, as in the case of private letters between friends, such letters having no literary quality or value based on the reputation or standing of the author, the true reason for equitable relief is not so clear.[8] It is true that the author is the owner of the composition as property irrespective of its value. At law in such case the damages recovered would be nominal, as the right of publication has no value. Why has equity intervened in such cases by injunction? Protection of a property right of no value is surely not the true reason, though the property right in the composition is the ostensible reason given by the courts.[9]

7 In White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319 (1908), Chafee, Cas. Eq. 72, the court held that the copyright of two musical compositions was not violated by the unauthorized production and sale of music rolls by which the music of these compositions could be reproduced on player pianos, as such rolls were not "copies" within the meaning of the statute. Judge Holmes concurred specially, but pointed out that the purpose of the statute required that reproduction of these compositions in this way should be within the control of the author. This was accomplished by Act of Mar. 4, 1909, c. 320, § 1, 35 Stat. 1075, 17 U. S. C. § 1 (1926). See Rogers, The Subject Matter of Copyright (1920), 68 U. of Pa. L. Rev. 215.

8 Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912), 1 Cook, Cas. Eq. 562, contains an able review of the English and American cases involving the author's property right in such letters, establishing such right by practically undisputed authority of many well considered cases. As stated in that case property in the letter as a physical thing passes to its recipient, but the sender retains property in the composition so as to be able to restrain an unauthorized sale of copies. The receiver of the letter may destroy it, give it to another or sell it as an autograph, and do anything else with it as he pleases other than the publishing and sale of copies.

9 See preceding note. See Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818), decided on the technical ground of protecting a property right, though the substance of the suit was to prevent the malicious publication of letters which might have seriously injured the reputation of the author.

The true reason actuating the courts in these cases was the protection of the author's right of privacy, a personal right having nothing to do with property.[10]

Nice questions have arisen as to what constitutes a dedication to the public. By statute in England the public production of a play or musical composition is a dedication which makes it public property unless it is copyrighted.[11] In the United States there is no such statutory provision, and it is now settled law that the presentation of an unpublished play or similar work to an audience who have paid for the privilege is not a dedication to the public, and an injunction restraining an unauthorized production by another will be granted though no copyright has been secured, and even though the play is of English origin and would not be protected in England because of the statute above referred to.[12] Sermons and addresses by public men at meetings open to the general public are dedicated to the public so that their authors lose their property right in them as compositions.[13] On the other hand lectures given by university and college professors to classes who pay tuition are not so dedicated, and their authors may restrain the unauthorized publication and sale of notes taken by persons in attendance at such lectures.[14] To constitute a dedication the publication must be open

10 Pound, Equitable Relief against Defamation (1916), 29 Harv. L. Rev. 640 *et seq.*

11 Copyright Act of 1842, 5 and 6 Vict. c. 45, § 20.

12 Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263 (1912). This is true though an American play sold for production in England will not receive similar protection in the English court if it has been presented publicly in the United States, this being caused by the Act, 7 and 8 Vict. c. 12, § 19 (1844), which expressly so provides.

That the public performance of a play is not an abandonment of it to the public see Macklin v. Richardson, Ambl. 694, 27 Eng. Rep. 451 (1770); Boucicoult v. Fox, 5 Blatchf. 87, 97 (1862); Crowl v. Aiken, 2 Biss. 208 (1870); Palmer v. DeWitt, 47 N. Y. 532 (1872); Tompkins v. Halleck, 133 Mass. 32 (1882), overruling Keene v. Kimball, 82 Mass. 545 (1860).

13 In Caird v. Sime, 12 App. Cas. 326 (1887), Lord Halsbury said ". . . It is intelligible that where a person speaks a speech, to which all the world is invited, either expressly or impliedly, to listen, or preaches a sermon in a church, the doors of which are thrown open to all mankind, the mode and manner of publication negative any limitation."

14 See preceding note. Also see N. J. State Dental Soc. v. Dentacura Co., 57 N. J. Eq. 593, 41 Atl. 672 (1898), aff'd, on opinion below, 58 N. J. Eq. 582, 43 Atl. 1098

to all. Private circulation of a book among friends,[15] or a limited publication to a few who attend a lecture or other meeting on invitation or on payment of a fee, is not a general publication to all which constitutes a dedication to the public.

The early cases hesitated about granting an injunction in these cases if the legal right was in doubt, and considerable authority existed for the rule that such disputed legal right should be settled by an action at law before equity would grant relief. There seems to be nothing of this left under the modern cases, equity deciding the questions of fact on which the rights of the parties turn without any question of requiring a prior adjudication at law.[16] The merger of law and equity under the Code in the large majority of the states and under the Judicature Acts in England, requiring the final disposition of the entire controversy, both at law and in equity, in a single action, necessarily eliminates any such question.[17]

§ 43. Patents. A copyright, as we have seen, protects for a limited time the author's property right in a composition. The thoughts or ideas expressed in the composition are not protected. They are free to all and may be made use of without restriction. Violation of the copyright exists rather in the copying and publishing of the composition made up of the combination of words and phrases by which the author has expressed his ideas. This right of everyone to make use of ideas of others wherever he finds them, with or without permission of their authors, has an important modification in the law of patents.

Early monopolies granted by the crown based upon the royal prerogative are the forerunners of modern patents. Their abuse to the advantage of royal favorites and others resulted eventually in the submission of the question of their validity to the common law courts.[18] In Darcy v. Allen,[19] the judges were

(1899); Cullen's Case, noted in report of Caird v. Sime, 12 App. Cas. 326, at 332 n. 2 (1887); Crome v. Aiken, 2 Biss. 208 (1870).

15 Prince Albert v. Strange, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849).

16 For the earlier cases in England see 1 Ames, Cas. Eq. 650–653. For modern cases see cases cited in notes *supra*.

17 See Chap. IV, *ante*.

18 4 Holdsworth, Hist. Eng. Law, 346–348.

19 11 Co. 84 (b)–88 (6), 77 Eng. Rep. 1260 (1594), also reported

unanimous in the position that a monopoly was *prima facie* against the common law as contrary to public policy. Professor Holdsworth points out that this and other cases make clear the exceptional situations in which such grants would be allowed in the public interest, the most important being to one who had introduced a new invention creating a new industry in the country.[20]

The Statute, 21 James I, c. 3 (1624), put this law in statutory form, created new remedies, and made fourteen years the period for which such patents might be granted. This statute established for the most part the principles which control modern patent law.[21]

Courts of equity began the granting of injunctions against violators of patent rights in the latter part of the eighteenth century.[22] During the first half of the nineteenth century the practice generally followed, both in England and the United States, was to require a determination of the legal right at law

More K. B. 671–675, 72 Eng. Rep. 830, *sub nom.* Darcy v. Allin, Noy 173, 74 Eng. Rep. 1131.

[20] 4 Holdsworth, Hist. Eng. Law 349. Fuller in his argument in Darcy v. Allin, Noy 173, 182, 74 Eng. Rep. 1131, 1139, said "that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the Commonwealth." Small improvements on existing processes did not justify a patent. Introduction of a process new to England, whether novel abroad or not, was the basis of the grant.

[21] 4 Holdsworth, Hist. Eng. Law, 353, *et seq.* The sixth clause provided that the Crown might grant letters patent for fourteen years or under "of the sole working or making of any manner of new manufactures within this realm to the true and first inventor . . . of such manufactures which others at the time of making such letters patent . . . shall not use."

United States Act of July 8, 1870, c. 230, § 34, 16 Stat. 201, 35 U. S. C. § 32 (1926), provides for a patent to any person "who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." Section 22 provides that every patent shall contain a grant to the patentee, his heirs or assigns of the exclusive right for seventeen years to make, use and sell the invention or discovery throughout the United States. Section 55 provides for the remedy of injunction in patent cases, and the recovery of damages in addition to an accounting for profits in the action in equity.

[22] For citation of the early English cases in which injunctions were granted in patent cases see Chafee, Cases on Equitable Relief against Torts, 67.

where the validity of the patent was in dispute before granting equitable relief.[23] The absurdity of this requirement in patent cases, involving extensive testimony and scientific technical questions of great difficulty, far beyond the ability of the average juror, has resulted in the practical disappearance of this rule, all questions of law and fact being decided by the court in the equity case, without resort to a prior action at law.[24] This result was inevitable in any event because of the merger of law and equity in England under Lord Holt's Act and the Judicature Acts, and in the thirty code states and territories of the United States.[25]

An injunction will not be denied in a case where the defendant is willing to pay what the court may fix as the reasonable value of a license to use the patented article, but is unwilling to pay the price demanded by the owner of the patent. Such a rule would deprive the patentee of the exclusive right to use, manufacture and sell, given him by the statute, substituting a price fixed by the court rather than by himself for the privilege of using his invention.[26]

§ 44. Injuries to Business; Unfair Competition. Wrongful interference with a man's right to do business by unfair com-

23 See preceding note; also cases cited in 1 Ames, Cas. Eq. 629 n. 1. That neither party can insist on trial by jury of disputed questions of fact in patent cases, see cases cited in same note.

24 Goodyear v. Day, 2 Wall. Jr., 283 (C. C. 1852), Chafee, Cas. Eq. Rel. agst. Torts, 68. As to the disappearance of jury trial in patent cases see quotation from opinion by Lacombe, J., in Wyckoff v. Wagner Typewriter, 88 Fed. 515 (1898), and of Hand, J., in Parke-Davis & Co. v. Mulford Co., 189 Fed. 95, 115 (1911), in Chafee, *op. cit.* 70.

25 See Ch. IV, *ante.*

26 Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co., 49 Fed. 930 (1892). In Continental Paper Bag Co. v. Eastern Paper Bag Co., 150 Fed. 741 (1906), Clark, Cas. Eq. 838, aff'd, 210 U. S. 405, it appeared that the plaintiff's patent had not been put into commercial use. According to the prevailing opinion no reason for the plaintiff's failure to use the patent appeared in the record, and an injunction was granted. Judge Aldrich, in a dissenting opinion, asserted that the only purpose of the plaintiff's suit was to prevent the use of his invention because its use would compete with the plaintiff's business, and the dissenting opinion argues vigorously that the purpose of the patent law is to encourage industry for the public benefit; that holding a patent in order to suppress its use is contrary to the real purpose of the statute. See Note (1907) 20 Harv. L. Rev. 638; (1903) 16 *ibid.* 444; (1904) 18 *ibid.* 151, (1912) 25 *ibid.* 641.

petition is restrained by equity because damages at law are inadequate, as explained heretofore.[27] Reasonable and fair competition is so largely the basis of our economic relations and so essential to the public interest that the restraint of competition will be made only in a very clear case of wrong committed by the competitor. Just as the fullest enjoyment of land ownership demands the restraint of full freedom by forbidding unreasonable user interfering unreasonably with like rights of enjoyment of others, so the greatest enjoyment of trade and business demands that each so act that he will not interfere unreasonably with the right of others to do business and secure an income. This right to make a living by securing an income from the exercise of a trade, profession, or business or any activity of any kind in which a person may be engaged, is so obviously fundamental that it must be protected by the law, and as the remedy of damages is clearly inadequate, equity intervenes by injunction to restrain the wrong, prior damages being now recoverable in the same action, as in other similar cases heretofore considered. It follows that in this field the action in equity has almost entirely supplanted the action at law as a practical matter.

Unlawful injury to this right to do business or to work for an income in any way, takes the form either of unfair competition, or of malicious or fraudulent interference with the right, though no competition exists. The law protects this right against unreasonable and unlawful interferences irrespective of whether the wrongdoer is actuated by a desire to profit in a competing business as a result of his wrong or merely by a desire to do the plaintiff an injury. In discussing the different forms which torts of this kind take, this fundamental principle must always be kept in mind. This right to do business, to labor or to make an income by any form of personal activity is not property in any usual sense. Judge Holmes very aptly calls it a course of conduct.[28] Dean Pound describes it as "a right of substance,"

[27] See § 41, *ante*.

[28] In dissenting opinion in Truax v. Corrigan, 257 U. S. 312, at 342, 42 Sup. Ct. 124, at 133 (1921). "An established business no doubt may have pecuniary value, and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct. . . ."

a right of pecuniary value of the greatest importance which law and equity must protect.[29] Equity protects rights of this kind whether they be called personal or property rights, and to that extent any rule which may have existed in earlier times that equity will intervene to protect only rights in property is necessarily modified. We now consider separately the more important classes of cases of wrongs of this character.

§ 45. **Trade Secrets.** The notion that trade secrets are property has nothing to support it. Any thought or idea not covered by a patent may be taken and used by anyone with impunity. Trade secrets, including such things as secret chemical formulas, secret devices for manufacture, lists of customers, lists of prices of goods in a secret code, secret trade data kept for the purpose of carrying on a business, are of obvious value as incidents of the business in connection with which they exist and of which they are a part. Their use by a third party will be restrained and damages may be recovered therefor only where such use amounts to unfair competition or to malicious or otherwise unreasonable interference with the plaintiff's right to do business.[30] Where a competitor induces an employe of the plain-

[29] Pound, Equitable Relief against Defamation (1916), 29 Harv. L. Rev. 640, 661, 662, *et seq.*

[30] In Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (1906), a plan in written form for consolidating companies in a certain industry was submitted by plaintiff to defendant, to secure his cooperation and financial aid in carrying it through. Defendant substantially carried out the plan without admitting plaintiff to a share in the enterprise. In sustaining the defendant's demurrer the court said, after explaining the law of copyright and pointing out that copyright in no way prevents the use of the author's ideas: "In the case of secret processes of manufacturing, the law does, to a certain extent, enjoin the use of ideas. It would, of course, on the same principle on which it affords protection to the unpublished manuscript in the hands of the author, enjoin the publication or exhibition of the paper containing the formula; but it does more. In enjoining the use of the formula it restrains the wrongdoer from putting the idea formulated to practical account. Stone v. Grasselli Co., 65 N. J. Eq. (20 Dick) 756. The protection ends when the secret becomes known. In the case of patent rights the statute goes still further. It affords protection for a limited period to a certain class of ideas, known as useful inventions, after the inventor has published them to the world, and because he has so published them."

tiff or other fiduciary to disclose such secrets in violation of his contract with his employer or in violation of the trust and confidence imposed in him, a clear case of unfair competition exists.[31] If the disclosure of such secrets by an employe, or by a third person who has secured them by dishonest means, will result in serious injury to the plaintiff's business, equity will grant relief, though no competitor or unfair competition is in-

31 Where an express promise is made by the employe not to disclose or use the secret, the promise will be specifically enforced. Sherman v. Pfefferkorn, 241 Mass. 468, 135 N. E. 568 (1922). Some of the cases base the granting of an injunction on an implied promise, but in these cases this fiction is entirely unnecessary, for if the situation is one where such a promise might fairly be implied, it must necessarily be a case in which the employe will be enjoined because of breach of trust and good faith. Morrison v. Moat, 9 Hare 241, 68 Eng. Rep. 492 (1851); Stevens & Co. v. Stiles, 29 R. I. 399, 71 Atl. 802 (1909); Macbeth-Evans Glass Co. v. Schnelbach, 239 Pa. 76, 86 Atl. 688 (1913); Westervelt v. Nat. Paper Co., 154 Ind. 673, 57 N. E. 552 (1900); Conviser v. J. C. Brownstone & Co., 209 App. Div. 584, 205 N. Y. Supp. 82 (1924). That breach of trust by the employe is the basis of the injunction, a contract being unnecessary, see Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 67 Atl. 339 (1907); Elaterite Paint Co. v. Frost Co., 105 Minn. 239, 117 N. W. 388 (1908). Of course a third person acquiring knowledge of such secrets from an employe with notice of the employe's breach of trust or of contract will also be enjoined. See last two cases cited *supra,* also International Register Co. v. Recording Fare R. Co., 151 Fed. 199 (1907). The tort arises in these cases from the unfairness involved in breach of good faith or of contract, making the use of the secret unfair competition if a competitor is involved, or malicious destruction of the plaintiff's right, if no competitor is involved. See O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140 (1897), discussed in Note (1897) 11 Harv. L. Rev. 262. It is argued in this note or comment that the employe holds the secret as a trust *res,* treating the secret like a piece of property held by a trustee, and arguing that this explains why a purchaser for value of the secret without notice of the trust is protected. But surely the employe has no legal title to the secret as property which he can transfer to another. Treating it as property in any such sense, other than an incident of the general right to do business, cannot stand up under any careful analysis.

Professor Cook asks (1 Cas. Eq. 584 n.): "Would relief be granted if the information had been stolen?" No doubt it would though no breach of contract or trust would exist, as against the thief, to prevent unfair competition or malicious danger to the plaintiff's business. See Nims, Unfair Competition (2d Ed., 302 n. 29. Would an innocent purchaser from the thief be enjoined? See *post* note 36.

volved. Malicious and unjustified injury to the plaintiff's business is equally wrongful and should be restrained whether the wrongdoer is a competitor or not.[32] Some of the cases contain statements asserting that an inventor has a property right in his invention or idea so long as he keeps it secret, just as the author of a manuscript has a property right in the composition so long as it is unpublished.[33] But this common law copyright in unpublished writings differs radically from the right of the author of an invention, formula or other trade secret, in that the composition is protected as property against any and all persons until it is made public property by dedication to the public,[34] while such trade secrets are mere ideas which may be freely used by any third person who acquires them honestly, without fraudulent or unfair means. The composition is a created thing, the definite property of its author and protected as such.[35] Ideas, whether in the form of inventions, formulas, lists of customers, price lists, or other trade secrets or contained in unpublished writings are not property. They are free to all who may acquire them from the inventor or author without using unfair means.[36] The law gives damages for, and equity

32 In Simmons Hardware Co. v. Waibel, 1 S. D. 488, 47 N. W. 814 (1891), 1 Cook, Cas. Eq. 577, a code system of prices of hardware worked out by the plaintiff at considerable expense, had been given by plaintiff's traveling salesman to the defendant, who made a copy and threatened to disclose it, with key, to other customers of the plaintiff, which would destroy its usefulness, making it necessary to invent and prepare a new system. The court granted equitable relief because of the damage which would result from such disclosure, though no action by a competitor was involved. The court refers to the system as property, but without analysis. Clearly the wrong threatened was a gratuitous injury to plaintiff's business without justification or reason and therefore malicious.

33 Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12 (1889); Peabody v. Norfolk, 98 Mass. 452 (1868), [in this case an express contract by employe not to disclose existed].

34 See § 42, *ante*.

35 See § 42, *ante*.

36 Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068 (1890), Judge Holmes saying: "So far as the right to manufacture and sell the medicine goes, the plaintiff's case may be disposed of in a few words. Dr. Spencer [the inventor] had no exclusive right to the use of his formulas. His only right was to prevent any one from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them without Dr. Spencer's permission, and against his will. Peabody v. Norfolk, 98

enjoins the use or disclosure of such secrets when they have been secured dishonestly or unfairly so that their use or disclosure amounts to unfair competition, or to gratuitous and unreasonable, and therefore malicious, damage to the inventor's or author's right to make profits from their use. The tort arises from interference with the right to do business, to make profits, to earn a living, and only as this right may be regarded as property is any property right involved. It is a right of substance and of great importance and financial value which law and equity must protect. It is entirely unnecessary to do violence to the term "property" by applying it to this right. Property rights are exclusive, with definite limits. The right to work, to carry on business, to make a living, like the right to "life, liberty and the pursuit of happiness," is, in any strict classification, a personal right, involving a strictly personal course of conduct. That it is a right of substance, having very definite and important financial value, makes it to that extent like property, and requires the protection which law and equity give it.

An employe, on leaving his employment, will not be restrained from making use of the knowledge and skill which he has ac-

Mass. 452, 458. Morison v. Moat, 9 Hare 241, 263; Williams v. Williams, 3 Meriv. 157. The defendant got his knowledge honestly. . . ." To same effect, Watkins v. Landon, 52 Minn. 389, 54 N. W. 193 (1893). Nims, Unfair Competition (2d Ed.) 302.

In Stewart v. Hook, 118 Ga. 445, 45 S. E. 369 (1903), where *A* sold the secret to *B* and then to *C*, each paying value, *C*, as well as *B*, could use the secret, as *C* had no notice of the prior sale to *B*. *C* had secured the secret without wrong. It would seem to follow that an innocent purchaser of the secret from a thief should be protected, as he has secured the idea without wrong to anyone. In McClary v. Hubbard, 97 Vt. 222, 122 Atl. 469 (1923), the court refused an injunction against one who made a drawing of the invention since it appeared that no unfair means had been used. See (1924) 33 Yale L. J. 439.

In Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (1906), quoted from *supra* note 30, and in Bristol v. Equitable Assurance Soc., 132 N. Y. 264, 30 N. E. 506 (1892), the court in each case denied relief to the plaintiff who had disclosed to the defendant a plan, in the first case for the consolidation of certain corporations, in the second for the sale of insurance, which the defendant in each case had made use of independently, excluding the plaintiff from participation, on the ground that the plans were mere ideas not owned as property, and in the absence of contract, express or implied, by the defendant not to use the plan, or to use it only on the basis of compensation therefor, the plaintiff had no remedy.

quired in the employment, though the result may be interference with his former employer's business.[37] The business secrets pro-

[37] Alperton Rubber Co. v. Manning, 86 L. J. Ch. (N. S.) 377 (1917). In Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 130 Pac. 1180 (1913), a driver was permanently enjoined from "in any manner soliciting or receiving laundry work from any of the persons" who had been customers of the plaintiff on the laundry route on which the driver had been employed. In New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac. 990 (1916), the court held that such a driver would not be restrained from "receiving" laundry work from such customers, though he should be restrained from soliciting their business. Whether the employe uses a written list of customers, or simply uses his knowledge of such customers gained in the plaintiff's service, is immaterial. The injunction against solicitation will issue in either case. People's Coat &c. Supply Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15 (1916), aff'd, 224 N. Y. 727, 121 N. E. 886 (1919). But in Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090 (1910), a salesman for the plaintiff was enjoined "from using any list or copy of list which has been made or retained," the court saying that he could not be restrained from soliciting or selling to these former customers of the plaintiff "so long as he does so in an open and fair manner." In the New Method Laundry Co. case, *supra*, the court said: "But coincident with the right of the employer to the protection of his trade secrets . . . is the right of all persons, in the absence of negative covenants to the contrary, to follow any of the common occupations of life. . . . It cannot, indeed, be questioned that an employe, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade."

In Fulton Grand Laundry Co. v. Johnson, 140 Md. 359, 117 Atl. 753 (1922), an injunction was denied in a similar case because the names and addresses of the customers were not a trade secret, as the competitor who employed the plaintiff's driver could have secured the information by merely following the driver on his rounds for a week. After conceding that protection from disclosure or use of such lists of customers should be given where they actually constitute a trade secret not readily discoverable by third persons, the court said: ". . . We are not willing to hold that in any ordinary business an employee, on going into business for himself or into the employ of another, should be enjoined from seeking to do business with friends he has made in the course of a previous employment. . . . Such a rule would tend to destroy the freedom of employees, and to reduce them to a condition of industrial servitude. See Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356; Stein v. National Life Association, 105 Ga. 82, 40 L. R. A. 150; American Specialty Co. v. Callis Co., 235 Fed. 935." See also Kansas City Laundry Service v. Jeserich, 213 Mo. App. 71, 247 S. W. 447 (1923); Boosing v.

tected by law and equity must be such that both parties, as reasonable men acting in good faith, must have understood should not be disclosed.[38] It is easy to say that the disclosure, to be enjoined, must be unfair, dishonest, unjust. It is not easy to apply any definite test by which these qualities may be determined. The matter should be decided by balancing the right of the employe to sell his labor and to realize on the knowledge and skill which his experience has given him as against the similar right of the employer to make profits from his business, so that each may enjoy his right in the fullest measure, subject to the duty of each not unreasonably to interfere with the right

Dorman, 148 App. Div. 824, 133 N. Y. Supp. 910 (1912), *aff'd* 210 N. Y. 529, 103 N. E. 1121 (1913); Boone v. Kreig, 156 Minn. 83, 194 N. W. 92 (1923); Stein v. National Life Ass'n, 105 Ga. 821, 32 S. E. 615 (1899), [Insurance agent not restrained from selling insurance to persons to whom he had sold insurance for another company under a prior employment]; Hamilton Mfg. Co. v. Tubbs Mfg. Co., 216 Fed. 401 (1908).

[38] "It is not enough that one man has worked for another. The employee has a perfect right to grow with his experience. He has a right to carry away for general use everything that he learns in his place of employment, except trade secrets. The public interest requires this as much as it requires that trade secrets should be respected. The employee or associate should be notified of the exact trade secret, that he may know what results of his experience he can and what he cannot take away and use freely." Fish, The Ethics of Trade Secrets, 29 Proc. Amer. Soc. Mechanical Eng. 13, at 31.

The difficulty arises where no express notice exists. The law must then balance these conflicting rights and this can be done only by deciding what the parties as reasonable men should have understood as to the use of such information after termination of the employment. See Cincinnati Bell Foundry Co. v. Dodds, 19 Weekly Law Bul. 84 (1887) opinion by Taft, J.

Where the information is not confidential so that the use of it is not a breach of trust or good faith (and this question must be decided according to the standard of good faith which should apply under the circumstances between the parties as reasonable men of the average sort) no injunction or other relief will be given. Boosing v. Dorman, 148 App. Div. 824, 133 N. Y. Supp. 910 (1912), [a list of retail dealers being involved, which might be secured in a public directory]; Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 132 N. Y. Supp. 37 (1911) ("This [using knowledge gained in old employment] if it involves no breach of confidence, is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory"); Stein v. Nat. Life Ass'n, 105 Ga. 821, 32 S. E. 615 (1899).

of the other. There should be no greater difficulty to determine what is "reasonable," applying the test of the average man, in these cases than in cases of determining what is reasonable user in nuisance cases, or in determining what is reasonable care in negligence cases. We are dealing here with legal rights, and therefore it is not an instance of determining what is just or unjust under the discretionary power of a court of equity. There is little or no analysis of this matter in the cases, though it is clear enough that the courts have tacitly given relief on the basis here suggested.[39] It will be observed that in probably a majority of the cases reference is made to trade secrets as property or property rights, but undoubtedly the courts mean by this only that they are rights of substance and money value as explained above.

The assignee of a trade secret has the same rights against unfair disclosure and use which his assignor had.[40]

§ 46. Trade-Marks and Trade Names. The law of unfair competition originated in trade-mark cases in which the courts enjoined sales in violation of the complainant's trade-mark because of the injury to the complainant's business caused by the defendant's dishonest sales of his goods as those of the complainant.[41] The modern cases establish conclusively that a trade-mark is an inseparable part of the business with which it is used, and the wrongful use of it by another by which he sells his goods as those of the owner of the trade-mark, is one of the clearest cases of tortious injury to the right to do business by unfair competition.[42] Here, as in the trade secret cases dis-

39 See *supra* notes 36, 37, 38.

40 Cincinnati Co. v. Dodds, *supra* note 38.

41 Nims, Unfair Competition (2d Ed.), § 2, referring to Blanchard v. Hill, 2 Atk. 484, 26 Eng. Rep. 692 (1742), in which Lord Hardwicke refused an injunction "to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." In 1783, in Singleton v. Bolton, 3 Doug. 293, 99 Eng. Rep. 661, the modern rule was clearly stated, though the injunction was denied because the plaintiff was the son of the original inventor and sold the medicine under his father's name, not under any mark of his own, so that the defendant in using the inventor's name violated no right of the plaintiff, no letters of administration having issued. One of the earliest American cases was Taylor v. Carpenter, 3 Story 458 (1844).

42 See cases discussed in notes following.

cussed in the preceding section, the injury is to the complainant's right to do business, not to any property in the trade-mark as a specific thing apart from the business. A trade-mark is not property in itself. It is a thing of value which necessarily goes with the business as part of it, and only as the good-will of the business can be called property is there any injury to property or property rights in these cases.[43]

Judge Vann said in a New York case:[44] "The function of a trade-mark is to point out the maker of the article to which it is attached." Mr. Nims adds: "It would be difficult to improve upon this definition had Judge Vann used after the word maker the word 'or vendor.'"[45] The purpose or object of pointing out the owner or vendor is the protection of his business against sales of goods dishonestly represented to be his, and protection of the trade-mark by the courts has as its sole object the prevention of or remedy by damages for such dishonest sales. This is the essence of the function and purpose of trade-marks. Actual or threatened dishonest sales of this nature must be found before relief will be given. This fundamental principle applied to the cases helps to clear away apparent inconsistencies in the law.[46]

[43] "The trade-mark is the expression, the symbol, of part or all of the good-will of the business using the mark. A trade-mark is just as necessary to the creation and development of good-will as words are to the use and expression of thoughts." Nims, Unfair Competition (2d Ed.), 378.

Pitney, J., in Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, 36 Sup. Ct. 357 (1916), after explaining that a trade-mark is not a property right *per se*, but only as his right to do business is a property right, said at 414, 36 Sup. Ct. at 361: "In short the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business."

[44] Waterman v. Shipman, 130 N. Y. 301, 311, 29 N. E. 111, 117 (1891).

[45] Nims, *op. cit.* 377.

[46] "They [viz., trade-mark rights] do not create any monopoly in the article itself; there can be no damage in connection with violation of these rights, except as there is injury to the business and good will." Dennison, J., in G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, at 372–3 (1912), quoted in Nims, Unfair Competition (2d Ed.) 389, 390.

"Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same descrip-

The common law trade-mark arises from adoption and use in connection with actual sales, the mark being physically applied to the article or its container.[47] But the use of the same mark by another will be restrained only where actual or probable injury to the business of the adopter of the trade-mark exists. Therefore the same mark may be used to designate a distinctly different line of goods.[48] The use of the same trade-mark in a different territory to which the first adopter's business has not been extended is clearly within the law.[49] To establish unfair

tion, because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy. Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. . . . This essential element is the same in trade-mark cases as in cases of unfair competition. . . ." Pitney, J., in Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, at 411, 36 Sup. Ct. 357, at 360 (1916).

47 See Nims, Unfair Competition (2d Ed.) 411–416; Waldes v. Internat. Mfgr's Agency, 237 Fed. 502 (1916); Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 (1892). A sign on the building where the business is conducted may be a trade name, but it is not a trade-mark unless attached to the goods. Oakes v. St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467 (1898). See cases in notes 49–52 following as to the user required.

48 See Nims, *op. cit.* § 221. Nims illustrates by many cases how the courts decide whether the trade-mark is used unfairly or not by the defendant in many situations in which varying degrees of relationship existed between the lines of goods manufactured or sold by the opposing parties. The test is always the same: Does the use of the trade-mark by the defendant amount to unfair competition?

49 Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403, 36 Sup. Ct. 357 (1916), quoted from *supra* note 46. The name "Tea Rose" had been adopted and used by Allen & Wheeler Co., and its predecessor since 1874. The Hanover Co. adopted the same mark, not knowing of the earlier adoption and use, in 1885, and built up an extensive business in Alabama and neighboring states under this trade-mark. No sales by the plaintiff in those states were claimed. Pitney, J., said at 415, 36 Sup. Ct. at 361: "Expressions are found in many of the cases to the effect that the exclusive right to the use of a trade-mark is founded on priority of appropriation. Thus, in Canal Co. v. Clark, 13 Wall. 311, 323, reference is made to 'the first appropriator'; in McLean v. Fleming, 96 U. S.

competition in these cases the plaintiff must establish actual or probable injury to his business as it exists. The use of his trade-mark where he has no business, and where his trade-mark is therefore unknown, can do him no harm. Treating a trade-mark as a kind of property in itself, arising by priority of adoption and technical local user, however slight, without territorial limits after it has arisen, is supported by some uncertain authority and ill-considered *dicta*.[50] It is completely overthrown by the later and more carefully considered cases which limit the right to the territory to which the business has been extended.[51]

The difference between a pure trade-mark, in which the words or symbol used is not so descriptive of quality, place of manufacture or the like, as to tend to restrict others from properly describing similar goods, and a mark or symbol which is so descriptive, but which has acquired a secondary meaning in the maker's or vendor's trade by a sufficiently extended user, is a mere difference in the extent of user which must be proved in order to establish unfair competition by a wrongful user of the trade-mark in either case.[52] The term trade-mark is applied to

245, 251, to 'the person who first adopted the stamp'; in Manufacturing Co. v. Trainor, 101 U. S. 51, 53, the expression is 'any symbol or device, not previously appropriated, which will distinguish,' etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like." The court held that no injunction against the defendant should be given. Accord: United Drug Co. v. Rectannus Co., 248 U. S. 90, 39 Sup. Ct. 48 (1918). See note (1916) 29 Harv. L. Rev. 763.

50 See Nims, Unfair Competition (2d Ed.) § 220, in which several cases of this sort are referred to.

51 See cases *supra* note 49.

52 The principle involved in refusing to allow terms of description, quality, location of plant, and the like, as trade-marks is this: No person should be allowed to monopolize the use of a term which others engaged in the same business should have a right to use in order to properly describe their product. Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599 (N. Y. 1849); Canal

both situations if the subsequent use of the mark in either case by a competitor is found to be unfair competition. The same fundamental principles apply to trade names as to trade-marks. The name under which a business has been conducted and by which it is known cannot be imitated by a competitor so as to mislead the public and to divert business to the competitor. Injury to the right to do business by unfair competition is apparent in such cases. Great difficulty has arisen where the competitor uses his own name, which happens to be the name under which the business so injured is carried on. The natural right of every person to carry on under his lawful name is in conflict here with the necessity of restraining fraudulent injury to the business of the complainant.[53] The difficulty has been met in some degree by requiring the competitor to use with his name

Co. v. Clark, 80 U. S. 311 (1871); Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270 (1901). For many illustrations of such terms not allowed as trade-marks see Nims, *op. cit.* 392–395, 398, 400. In several instances as appears from these illustrations, the same expression is sometimes rejected and sometimes allowed, the difficulty arising in the application of the principle. But in any case, if as a matter of fact through user for a sufficiently long time the term has come to have a definite meaning in the trade, or among those dealing with the person using the mark, as indicating his goods, the use of the same term by a competitor for the purpose of stealing the business of the original adopter of the mark is just as truly unfair competition as in cases of trade-marks which are not descriptive. The trade-mark is given effect in such cases under the doctrine of "secondary meaning" arising from such long-continued user. The "secondary meaning" doctrine is, briefly, that a word or phrase, in its primary meaning incapable of exclusive appropriation as a trade-mark because geographically or otherwise descriptive, may nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had become his trade-mark as to them. See opinion by Denison, J., in Merriam v. Saalfield, 198 Fed. 369, 373 (1912); also Amer. Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E. 141 (1899), in which the defendant was enjoined from using the term "Waltham" on its watches, though engaged in manufacturing watches at Waltham, because of the wrong to plaintiff's business, the court finding that the term "Waltham" by long user had acquired a secondary meaning as designating to the public the plaintiff's watches.

[53] See cases cited *post* note 54.

some definite statement making clear to those whom it reaches the fact that his business is distinct from the business of his opponent.[54] It has been pointed out that this is only effective in part, and that serious injury to a long established business operating and generally known under a family name necessarily occurs when another of the same name starts a competing business, in spite of such explanatory statements, as considerable confusion and consequent diversion of trade is bound to result from the use of the same surname by the competitor.[55] The courts, however, refuse to restrain the defendant from using his own name, no matter how clear the fraud, compromising by requiring explanatory statements or other devices designed to prevent injury to the plaintiff.[56] Statutes providing for the registering of trade-marks create remedies for their enforcement, and registration thereunder creates a presumption of adoption and and use and of the validity of the mark which stands until overthrown by evidence to the contrary. The statutes, however, add nothing to the substantive law applying to trade-marks and to unfair competition in their violation.[57]

§ 47. **Direct Injury to Trade or Business.** A man does something otherwise legal which causes substantial injury to another in his trade or business. When is such an act a tort? We have seen that the use by a competitor of trade secrets, trade-marks and trade names was tortious in any case amounting to unfair competition, and that a disclosure of trade secrets not in competition was a tort when done to the injury of the plaintiff without adequate cause or purpose. Exactly the same principles

[54] Chickering v. Chickering and Sons, 215 Fed. 490 (1914); Waterman v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91 (1914); Rowley v. J. F. Rowley Co., 161 Fed. 94 (1908); World's Dispensary Medical Ass'n v. Pierce, 203 N. Y. 419, 96 N. E. 738 (1911); Merritt Burial etc. Co. v. Stephen Merritt Co., 214 N. Y. 676, 108 N. E. 1108 (1915).

[55] Nims, Unfair Competition (2d Ed.), 133–137. As Nims points out, a man cannot use his own name as the name of a corporation through which he carries on his business if unfair competition with a competitor of the same name will result, citing Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490 (1895).

[56] See *supra* note 54, also Nims, *op. cit.* § 70 and cases there cited.

[57] For a treatment in detail of the Federal Act and other statutes see Nims, *op. cit.* c. XVI.

apply to a direct injury where the violation of a trade secret, trade-mark or trade name is not involved. If the injury arises as a result of fair competition obviously no tort exists. Whether or not the act causing the injury amounts to unfair competition, must be determined, as in the cases above referred to, discussed in the preceding sections, by balancing the rights of both parties so that each may carry on his business or calling with the greatest freedom consistent with a similar right in the other. Just as the fullest enjoyment of real property as between neighbors involves restraint on each so that neither will be permitted to interfere unreasonably with the rights of enjoyment of the other, so each business competitor must be limited to competition which is reasonable and fair in order that each may have the fullest possible freedom in his trade or business. Unfair competition means destruction of business and if permitted would leave the business of each competitor subject to destruction by any other, in whole or in part, just as the permitting of nuisances would leave each owner's property at the mercy of his neighbor. What is reasonable and fair as distinguished from unreasonable and unfair acts of competition must be determined, as are the wrongfulness of acts of user in nuisance cases, by applying the test of the average man, under the circumstances of each case.

Where the act of injury is not done by a competitor it cannot, of course, be justified as fair competition. Can it be justified as a reasonable act based on the self-interest of the actor, or on any other motive or purpose which makes the act reasonable according to the standard of the average man? If not, it is a wanton injury to an interest and right of fundamental importance and of substantial economic value which law and equity must protect whether the term "property" be applied to it or not. Such an injury may very properly be called "malicious," but the use of that term seems to add nothing to the solution of the problem. These principles must be kept in mind in considering the cases.

One of the earliest cases on this question was decided by Holt, J., in 1707.[58] The plaintiff maintained a decoy pond and made a business of decoying and taking wild ducks there for profit. The defendant frightened away the ducks repeatedly by firing guns on his adjoining land. He was held liable in an action on

58 Keeble v. Hickeringill, cited in note to Carington v. Taylor, 11 East 571, at 574, 103 Eng. Rep. 1126, at 1127 (1809).

the case for malicious injury to the plaintiff's business. This decision met considerable criticism in Allen v. Flood, decided by the House of Lords in 1891,[59] in which a discharged workman sued a union delegate for inducing his employer to discharge him. In this and other cases it was strongly argued that the malice or motive of the defendant cannot make an otherwise legal act, such as discharging a gun on his own land, illegal.

The later cases have settled the law that any act resulting proximately in substantial injury to the trade or business of another is an actionable wrong for which damages may be recovered if it amounts to unfair competition when the question arises between competitors in trade,[60] or if it is not justified by

[59] [1891] A. C. 1. Lord Herschell criticized as too broad the statement made by Bowen, L. J., in Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 613 (1889), that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade, is actionable if done without just cause or excuse." Lord Watson said (p. 12) that a bad motive will not convert a legal act into an illegal one. "A wrongful act done knowingly . . . may, in the sense of law, be malicious, but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law."

[60] The quotation in the preceding note from Mogul Steamship Co. v. McGregor was approved as good law in South Wales Miner's Fed. v. Glamorgan Coal Co. [1905] A. C. 239, a case in which damages were given against union officials for ordering men of the union to break their contracts, no wrongful motive being involved. See § 48, *post* on this question.

In Hutton v. Watters, 132 Tenn. 527, 179 S. W. 134 (1915), a clear statement of principles of liability for wrongful injuries to business appears: "Such right [to do business] existing, the commission of an actionable wrong is established against anyone who is shown to have intentionally interfered with it, without justifiable cause or excuse. To establish justification, it must be made to appear . . . that it had some real tendency to effect a reasonable advantage to the doer of it. But in order to determine the reasonableness of such act it must be considered from the standpoint of both parties, with a view to ascertaining whether the defendant has acted merely in the due exercise of his own right to carry on business for himself. . . . Whether the defendant was in the reasonable exercise of his own similar rights must . . . be determined by the court, or court and jury, in each case as it arises, on the law and evidence. . . . It is left in each case for the court, or the court and jury . . . to say whether the defendant's conduct complained of was, in view of all the circumstances, a reasonable and proper exercise of his right of self-protection or self-advancement."

reasonable self-protection or other valid reason under the test of what would be reasonable and fair conduct on the part of the average man in the same circumstances, where the injury is caused by a non-competitor.[61]

See also, Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N. W. 472 (1901), Clark, Cas. Eq. 867, in which the plaintiff secured an injunction against the defendant wholesale coal dealers and retail coal dealers in his town, against a combination by which the wholesalers agreed not to sell to any except the defendant retailers with the purpose of driving him out of business. See also cases in notes 61 and 62, *post*.

In American Law Book Co. v. Edw. Thompson Co., 41 Misc. 396, 84 N. Y. Supp. 225 (1903), the defendant was enjoined from making agreements to indemnify subscribers for damages for breach of contract in refusing to take plaintiff's books, and from defending suits brought for such breaches of contract. The court said that whether the subscribers were actually led to break their contracts by acts of the defendant was not important. "Intentional false statements, made with a view to obstruct the plaintiff's business and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition." The court declared damages at law inadequate, as damages from loss of business and business reputation could not be estimated or proved with any certainty, and because of the burden of further litigation in the future.

In International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68 (1918), the stealing and use of news by the International News Service by bribing employes of newspaper members of the Associated Press and inducing such members to violate the by-laws by disclosing such news was enjoined by the lower court, and the Supreme Court held that the taking of such news from bulletin boards and early editions of the Association newspapers and selling it as its own before its value as news had gone was unfair competition and should be enjoined. The Court said: "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. (In re Sawyer, 124 U. S. 200, 210; In re Debs, 158 U. S. 564, 593); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. Truax v. Raich, 239 U. S. 33, 37, 38; Brennan v. United Hatters, 73 N. J. L. 729, 742; Barr v. Essex Traders Council, 53 N. J. Eq. 101. It is this right which furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

61 Most of the cases of this kind are the labor disputes cases discussed in the following section. A good illustration of what might be unfair and unreasonable injury not

§ 48. Labor Disputes—Unfair Injury to Business and Inducing Breach of Contract. Most of the cases of wrongful injury to business not committed by a business competitor have developed out of labor disputes. These cases involve not only wrongful injuries to business, discussed in the preceding section, but also very frequently wrongful interferences with existing contract rights. A brief survey of the development of the law on this latter question is therefore necessary at this point.

Prior to the Ordinance of Laborers (1349), an employer recovered for loss of services in cases of actual injuries to his servants due to the violence of the defendant.[62] The great shortage of labor due to the Black Death in England resulted in the enactment of the ordinance above referred to, making punishable a laborer's quitting his service without reasonable cause before the end of the term agreed upon, and forbidding all others to receive or retain any such person in their employ.[63] In Lumley v. Gye,[64] the defendant was held liable for inducing

involving unfair competition or labor disputes is Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111 (1913), Clark, Cas. Eq. 870. The plaintiffs, real estate operators, sought an injunction restraining defendant from maintaining a sign, "For Sale. Best offer from Colored Family," on defendant's lot adjoining a number of lots which plaintiffs had for sale. They asserted that the sign was maintained, not to sell the lot to a colored family, but solely with the malicious purpose of injuring the plaintiffs in the sale of their lots. The court said that if this allegation were true an injunction would be granted, but they found that the sign was put up with the purpose of selling to anyone, including colored persons, which was an entirely legal purpose, and the maliciousness in the mind of the defendant was therefore immaterial.

62 See Sayre, Inducing Breach of Contract (1923), 36 Harv. L. Rev. 663, for a history of this early liability and the subsequent development of liability for enticing away servants under the Ordinance of Laborers, developing finally into the doctrine of Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

63 For a treatment of the action which developed under this ordinance see Wigmore, Interference with Social Relations (1887), 21 Am. L. Rev. 764.

64 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853). In the dissenting opinion Coleridge, J., insisted that liability for enticing away servants developed as an exception to the general principles of the law from the Ordinance of Laborers, that the party guilty of the breach of contract is alone liable as the breach is exclusively his; that fixing liability for such an act on a third person because of advice or persuasion would be highly impracticable and difficult of application, and no authority existed for the rule apart

an opera singer to break her contract to sing at the plaintiff's theatre for three months. The court held that the basis of liability for enticing away a servant was the inducing of a breach of a binding contract of service, irrespective of whether the employe had actually entered on the service or not, and irrespective of the nature or quality of the service. This doctrine, applied to contracts of service, was confirmed by later cases[65] and in 1893 it was extended to any case in which the defendant had wrongfully induced another to break a valid contract with the plaintiff to his damage.[66] This has become the accepted law prevailing in most of the states.[67] It is generally admitted in the cases that instances may exist in which a person is justified in inducing another to break a contract, as where performance of

from the exceptional situation created by the Ordinance of Laborers, which had no application to an opera singer.

65 Bowen v. Hall, L. R. 6 Q. B. D. 333 (1881); Jones v. Stanly, 76 N. C. 355 (1877).

66 Temperton v. Russell (1893), 1 Q. B. 715. Here the union induced materialmen to break their contract with contractors who refused to comply with the rules of the union.

67 Beckman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907), [holding that a contract giving to the plaintiff an exclusive agency throughout New England to book guests for a certain inn at the Jamestown fair, must be respected by the defendant, a competitor, who induced the proprietor of the inn to break his contract by giving a similar agency to the defendant. The court granted an injunction declaring damages to be inadequate]; Walker v. Cronin, 107 Mass. 555 (1871); Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125 (1901); Angle v. Chicago, St. Paul, etc. R. Co., 151 U. S. 1, 14 Sup. Ct. 240 (1894); Taylor Iron & Steel Co. v. Nichols, 70 N. J. Eq. 541, 61 Atl. 946 (1905); Employing Printers Club v. Dr. Blosser Co., 122 Ga. 509, 50 S. E. 523 (1905). See cases cited in notes following.

In New York the early cases rejected Lumley v. Gye. Ashley v. Dixon, 48 N. Y. 430 (1872); Daley v. Cornwell, 34 App. Div. 27, 54 N. Y. Supp. 107 (1898). The latest cases, however, are in accord with the general rule. See S. C. Posner Co. v. Jackson, 223 N. Y. 325, 119 N. E. 573 (1918); Lamb v. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920).

In California, Kentucky and two or three other states the doctrine of Lumley v. Gye is not accepted. See cases cited, Nims, Unfair Competition (2d Ed.), 342, including Bogson v. Thorn, 98 Cal. 578, 33 Pac. 492 (1893); and Boulier v. Macauley, 91 Ky. 135, 15 S. E. 60 (1891). In Missouri the doctrine is limited to contracts of service. Glencoe Land and Gravel Co. v. Commission Co., 138 Mo. 439, 40 S. W. 93 (1897).

the contract would be in violation of his rights, or where a parent, guardian or other near relative induces the breach of a contract, performance of which would cause serious injury to his child or ward.[68] Nothing appears in the cases, except possibly by way of suggestion, as to the principle on which such justification may be made to depend. In the South Wales Miner's Federation case, above referred to, union officers were held liable for ordering and procuring the stopping of work by the miners in the Federation on certain stated days, breaking their contracts with their employers, it being admitted that this step was taken by them without malice and in good faith for the good of the industry in order that prices of coal, and the wages of the men dependent on such prices under a sliding scale, might be maintained. The court expressly rejected the argument that there was a moral or social duty on the part of the officers to do what they did, creating a privilege analogous to privilege in cases of slander and libel. Nevertheless there seems to be no other principle on which privilege of any kind in these cases can be based.[69] In any event it is well settled that the right to compete is not a justification. The difference between liability for inducing a breach of contract as distinguished from liability for unfair competition is clearly expressed by a Massachusetts judge:—"A plaintiff's right to carry on business,

[68] See statement to that effect by Lord Macnaghten, Lord James and Lord Lindley in South Wales Miners' Federation v. Glamorgan Coal Co. [1905], A. C. 239. In Homan v. Hall, 102 Neb. 70, 165 N. W. 881 (1917), it was held that no action would lie against a third person for inducing breach of contract to marry. To so hold "might result in a suit by every disappointed lover against his successful rival."

[69] See Sayre, Inducing Breach of Contract (1923), 36 Harv. L. Rev. 663. Professor Sayre gives as illustrations of no liability on the part of a third person inducing such breach of contract, first, a drunkard induced by his family to break a contract for the purchase of whiskey; second, of a hat manufacturer forced to break his contract to manufacture and deliver hats because a third person, from whom he has been buying felt, sells his supply to another at a higher price knowing that the felt cannot be secured elsewhere. Obviously in the latter case the third party did not cause the breach. It was rather the lack of felt. Nevertheless there are many situations like the first referred to by Professor Sayre, where no liability arises though a breach of a valid contract is consciously accomplished. A doctrine similar to privilege in the law of libel and slander would meet the situation and the analogy is clear.

that is, to make contracts without interference, is an altogether different right from that of being protected from interference with his rights under a contract already made. . . . Where the plaintiff comes into court to get protection from interference with his right of possible contracts, that is, of his right to pursue his business, acts of interference are justified when done by a defendant for the purpose of furthering his (the defendant's) interests as a competitor.''[70]

The right of labor to organize and to quit work or to threaten to quit work in order to secure better terms and conditions of labor is settled beyond question.[71] The corresponding right of employers to hire and discharge when they please, and to lay down the terms under which their employes shall work, is equally well established.[72] But in every controversy between employer and employes, whether in the form of a lock-out or a

[70] Loring, J., in Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907).

[71] ''To organize for the purpose of securing improvement in the terms and conditions of labor, and to quit work and to threaten to quit work as means of compelling or attempting to compel employers to accede to their demands for better terms and conditions, are rights of workmen so well and so thoroughly established in the law (Thomas v. R. Co. [C. C.] 62 Fed. 803; Arthur v. Oakes, 63 Fed. 320, 11 C. C. A. 209, 25 L. R. A. 414; Wabash R. Co. v. Hannahan [C. C.], 121 Fed. 563), that nothing remains except to determine in successive cases as they arise whether the means used in the endeavor to make the strike effective are lawful or unlawful.'' Baker, Circuit Judge, in Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, at 49 (1908).

''From an examination of the cases and a very careful consideration of the subject I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom, on the part of the employer, to employ whom he will, and to cease to employ whom he will; and the corresponding freedom on the part of the workman, for any reason or no reason, to say that he will no longer be employed; and the further right of the workmen of their own free will, to combine and to meet as one party, as a unit, the employer who, on the other side of the transaction, appears as a unit before them. . . . Union workmen who inform their employer that they will strike if he refuses to discharge all non-union workmen in his employ are acting within their absolute right, and, in fact, are merely dictating the terms upon which they will be employed.'' Vice Chancellor Stevenson in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 761, 53 Atl. 230, 231 (1902).

[72] See quotation of opinion by Vice Chancellor Stevenson in preceding note.

strike, both sides are limited by the rules discussed above. Neither shall interfere unreasonably, and therefore unfairly, with the right of the other to do business, to sell his labor, to make a living; neither shall be the active producing cause of the breach of any valid contract by a third person to the injury of the other, subject, possibly, to the doctrine of privilege discussed above.

If in a strike or other industrial dispute those in charge of the strikers induce or compel employes to quit their work by threats, intimidation or direct violence, it is clear under the cases that those responsible are liable in damages at law, and an injunction against further threatened acts of the same kind will be granted. Wrongful injury to the employer's right to do business is clearly involved where unfair methods of this kind are used, as well as wrongful interference with the right of the non-striking workmen to make a living by selling their labor as they please.[73] It is also fully established by the cases that preventing the employer from hiring other workman by similar means is an unfair interference with his right to do business. If he is unfairly prevented from employing labor essential to his business he cannot go on with it.[74] We have in these cases

[73] Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (1902), 1 Cook, Cas. Eq. 603; Regina v. Druitt, 10 Cox C. C. 593 (1867); O'Neill v. Behanna, 182 Pa. 236, 37 Atl. 843 (1897); Davis v. Zimmerman, 91 Hun 489, 36 N. Y. Supp. 303 (1895); Butterick Pub. Co. v. Typographical Union, No. 6, 50 Misc. 1, 100 N. Y. Supp. 292 (1906); Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106 (1895).

A threat to do something which one has the legal right to do is not intimidation in the sense of these cases. Therefore threatening to strike if demands are not complied with is proper. See Hodges v. Webb, [1920] 2 Ch. 70, 88; Holmes, J., Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N. E. 1077 (1896). Sayre, Cases on Labor Law 193 n.

[74] "He [the employer] takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreasonable molestation and annoyance from the words, actions, or other conduct of any other persons *acting in combination.* What is the measure or test by which the conduct of a combination

the clearest illustrations of unreasonable and therefore unfair interferences with business demanding relief both at law and in equity. But suppose the employes are induced to quit by peaceful persuasion, without violence or intimidation. If no contract with the employer is broken as where the men are employed from day to day at will, there is no liability,[75] and *dicta* in some decisions to the effect that liability arises for inducing the men to leave their employment in such cases of employment at will on the theory of induced breach of contract cannot be supported.[76] In the cases referred to the employes at will were induced to quit by unfair means constituting unfair interference with business without reference to induced breach of contract.[77] A ques-

of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to the employer of labor in respect of his 'probable expectancies,' has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous, and not unreasonably sensitive man." Stevenson, V. C., in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, at 766, 53 Atl. 230, at 233 (1902). The court then points out the analogy to nuisance cases, emphasized in the foregoing sections of this work.

75 Boston Glass Manufactory v. Binney, 21 Mass. 425 (1827), [the court holding that a hiring of men by a competitor to take effect after their term of service had expired was legal]; Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Rogers v. Evarts, 17 N. Y. Supp. 264 (1891), aff'd, as Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72 (1894); Campbell v. Cooper, 34 N. H. 49 (1856). See quotation from Beekman v. Marsters in text, to which note 70, *supra*, refers, for the distinction between inducing a breach of an existing contract and unfair interference with the right to make contracts. See similar statements by Lord Herschel in Allen v. Flood [1898] A. C. 1, at 121, quoted in Sayre, Cases on Labor Law, 181 n.

76 Thacker Coal Co. v. Burke, 59 W. Va. 253, 53 S. E. 161 (1906); Frank & Dugan v. Herold, 63 N. J. Eq. 443, 450, 52 Atl. 152, 156 (1902).

77 Thacker Coal Co. v. Burke, *supra* note 76, was decided on demurrer, so that the wrongfulness and malice alleged in the declaration were admitted by the demurrer. Judge Taft pointed this out in commenting on this case in Am. Steel Foundries v. Tri-City Central Traders Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921). In Frank & Dugan v. Herold, *supra* note 76, intimidation and acts and words annoying the employes without their consent were involved.

tion of real difficulty, however, is presented by a case in which men employed for fixed terms are induced by the strikers to quit their work, breaking their contracts, as the result of arguments and persuasion without intimidation or other wrong. Where the best interest of the employes as a body will be advanced by the success of the strike, and united action by all as against unfair terms and conditions of employment may be demanded as a social duty, may not such breaches by peaceful persuasion come within the, at present, nebulous privilege which admittedly exists in some form in cases of induced breach of contract?[78]

In spite of earlier cases which regarded any picketing in a strike as a form of intimidation which should be enjoined, it is now settled by the great weight of authority in most jurisdictions that picketing, used only to secure information and by peaceful persuasion and argument to secure cooperation of workmen in the strike, without the use of force or intimidation, is lawful and will not be restrained.[79] Many of the cases which sustain

[78] In Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896), it was definitely held that inducing workmen to break existing contracts even by peaceful persuasion was unlawful and should be enjoined. See notes following.

In Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927), employes at will agreed that they would not join a union while in plaintiff's employment. The court held this to be a promise based on no consideration, not a valid contract. "Even had it been a valid subsisting contract, however, it should be noticed that whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent . . . is to extend its influence." See *post* notes 104, 105.

[79] Pope Motor Car Co. v. Keegan, 150 Fed. 148 (1906), Sayre, Cases on Labor Law, 207; Rogers v. Evarts, 17 N. Y. Supp. 264 (1891), aff'd as Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72 (1894), [the court saying: "The right to combine involves of necessity the right to persuade all co-laborers to join in the combination. This . . . involves the right to persuade new employees to join the combination."]; Exchange Bakery v. Rifkin, *supra* note 78; Foster v. Retail Clerks' Ass'n, 39 Misc. 48, 78 N. Y. Supp. 860 (1902); Goldfield Consol. Mines Co. v. Miners' Union, 159 Fed. 500 (1908). See long list of cases cited by Sayre, Cases on Labor Law, 211.

That all picketing necessarily amounts to intimidation and will be enjoined seems still to be the law in a few states. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Barnes v. Chicago Typographical Union, 232 Ill. 424,

as legal the inducing of employes to quit their employment by peaceful persuasion without intimidation or other wrong do not make clear whether inducing breaches of existing contracts in such cases would be a tort or might be privileged. In some of the cases, however, it is stated explicitly that inducing the breach of such contracts would be illegal,[80] and it is probable that statements in the other cases upholding peaceful picketing refer to inducing men to quit who are employes at will, free to end their employment without breach of any contract. There seems to be nothing in the cases tending to sustain a privilege of organized labor to induce breaches of existing contracts of employment no matter how worthy the objects of the strike may be nor how necessary to those objects may be the violation of such contracts.

The purpose of a strike bears directly on the question of whether interference with the right of others to do business or to sell their labor is fair or unfair, reasonable or unreasonable, according to the test of the average man outlined above. There is no doubt of the right to strike in order to secure better wages,

83 N. E. 940 (1908); Clarage v. Luphringer, 202 Mich. 612, 168 N. W. 440 (1918). Any considerable number of pickets will not be allowed, as intimidation by numbers and disorder incident to their actions are bound to result. See Am. Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921), in which Judge Taft stated that the strikers should be limited to one representative for each point of ingress and egress to the plant, all others being enjoined from congregating or loitering near-by, and that such representative be admonished that his arguments, appeals and persuasion shall not be abusive, libelous, or threatening, and that an unwilling listener shall not be annoyed by importunate following or dogging his steps. In Truax v. Corrigan, 257 U. S. 312, at 340, 42 Sup. Ct. 124, at 132 (1921); Taft, Ch. J., said: "We there held [in the Tri-City case] that peaceful picketing was a contradiction in terms." This apparently means that the term "picketing" applies only where unlawful means are used.

80 Thus in Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908), Baker, J., said at 49: "So far as persuasion was used to induce apprentices or others . . . to break their contracts to serve for definite times, the prohibition was right. And the reason, we believe, is quite plain. Each party to such a contract has a property interest in it. If either breaks it, he does a wrong, for which the other is entitled to a remedy. And whoever knowingly makes himself a party to a wrongful and injurious act becomes equally liable." See, also, to same effect, Holmes, J., in Vegelahn v. Guntner, *supra* note 78.

hours and other working conditions irrespective of the effect on the employer's business or upon the employment of other workmen not engaged in the strike, assuming that unfair methods are not used in the strike.[81] A strike to secure for members of the union the exclusive right to do work falling fairly within the field of labor of the trade of the members is legal in spite of the fact that others not in the union engaged in such work are deprived of their employment and are forced into other occupations, as combination to secure such employment by legal means is fair competition, and the damages sustained by the men so excluded are no more subject to redress than damages sustained by competitors in commercial enterprises from fair competition.[82] Strikes to force the unionizing of a business by refusing to work with non-union employes, and compelling the discharge of such men, are valid for the same reasons, no force, intimidation or other unfair means being used, but only the threat of or refusal to work for the employer.[83] Where the labor

[81] See *supra* notes 71 and 73, also Karges Furniture Co. v. Amal. Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877 (1905), Sayre, Cases on Labor Law, 264.

[82] Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906), [Quoting Hammond, J., in Martell v. White, 185 Mass. 255, 260, 69 N. E. 1085, 1087 (1904): "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is often selfish, often sharp, and sometimes deadly"]; Allen v. Flood [1898] A. C. 1 (the holding that inducing the employer to discharge men of another trade because they had done "iron work" on another job, contrary to the exclusive right to such work claimed by the boilermakers' union, did not make the union agent liable, as the men had a right to strike or to quit work if these men were not discharged, in protecting their interests as members of the union in competition with men of another trade).

[83] Commonwealth v. Hunt, 45 Mass. 111 (1842); Bowen v. Matheson, 96 Mass. 499 (1867); Jersey Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (1902); Kemp v. Division No. 241, A. Ass'n St. & Ry. Employes, 255 Ill. 213, 99 N. E. 389 (1912). See, also, cases in preceding note.

In National Ass'n Steamfitters v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902), Gray, J., in holding legal a strike in refusal to work with men not members of the union, said at 335: "Regarded either as an effort to secure only the employment of efficient and approved workmen, or as a mere struggle for exclusive preference of employment, on their own terms and conditions, from either standpoint how can it be said to be within the condemnation of the law, or of any statute, when there was no force employed, nor any unlawful act

union acts for the purpose of doing injury to the business of any person, or of his right to sell his labor, merely for the sake of

committed? Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses and to make any contract on the subject that he chooses. . . . They are free to secure the furtherance of their common interests in every way, which is not within the prohibition of some statute, or which does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts." To same effect, Exchange Bakery etc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927), quoted *supra* note 78.

Judge Holmes in his dissenting opinion in Plant v. Woods, 176 Mass. 492, at 494, 57 N. E. 1011, at 1015 (1900), states very clearly and in the fewest words the principle on which strikes to compel employment of members of the union only are sustained as legal: "The immediate object and motive was to strengthen the defendants' society as a preliminary means to enable it to make a better fight on questions of wages or other matters of clashing interests. . . . I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."

For additional cases establishing this doctrine as the prevailing rule see cases cited in Sayre, Cases on Labor Law, 311 n. In a note (*ibid.* at 318), cases are cited holding to the contrary. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900), quoted from above, so holds. See also Folsom v. Lewis, 208 Mass. 336, 338, 94 N. E. 316 (1911); Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917). The upholding in other Massachusetts' cases of the validity of trade agreements between employers and unions providing that none but union members should be employed so long as such members were available seems to greatly weaken those decisions. See Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919); Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1914). In Ruddy v. United Ass'n Journeymen Plumbers, etc., 79 N. J. L. 467, 75 Atl. 742 (1910), the union was held liable for procuring the plaintiff's discharge in order to force him to join their local, citing Massachusetts, Maryland and Illinois cases to same effect, but with little discussion of reasons. The opposing rule seems definitely established by Mayer v. Journeymen Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492 (1890), refusing an injunction (see opinion at 531, 20 Atl. at 496) and Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230 (1902), quoted from in note 71 *supra*. Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1914), cited as opposing the general rule, may fairly be regarded as in accord, since the men forced the plaintiff's discharge merely to injure him, in no way to fairly pro-

injury by way of punishment, or because of mere personal dislike, not for the purpose of promoting the rights of the members in their competition with other labor or with their employers, it constitutes unjustified injury for which damages may be recovered at law, and such acts will be enjoined in equity.[84]

The boycott cases illustrate clearly the application of the principles by which the legality or illegality of competitive injuries to business is determined. The strike cases referred to and discussed above illustrate the primary boycott, generally sustained as legal when force, intimidation or other wrongful method is not used, and restricted to action taken to protect the interests of employes in a struggle between them and their employer. Strikes to compel the employer to employ men of a certain union only upon specified lines of work, and strikes to eliminate non-union labor, are the most extreme cases of this kind which have been sustained, with considerable authority to the contrary in some of the states, as explained above. Protecting the men by extending their lines of work as against competitors in other trades, or by strengthening and establishing their union through which they are able to make their collective action effective in

mote their own interests, an unreasonable and therefore unjustifiable interference with his right to sell his labor. De Minico v. Craig, 207 Mass. 593, 94 N. E. 317 (1911), is a similar case.

84 Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1914), *supra* note 82. The court quoted Loring, J., in De Minico v. Craig, 207 Mass. 593, 599, 94 N. E. 317, 320 (1911): "The plaintiff had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what 'is distasteful' to some of them, is not in our opinion a superior or an equal right. . . . One who betters his condition only from what he merely dislikes and by securing what he likes, does not better his condition within the meaning of those words in the rule, that employes may strike to better their condition." The Pennsylvania court stated the true principle in saying (at 565, 91 Atl. at 226): "They had the right to combine to advance their own interests in any proper way, but not for the purpose merely of inflicting injury upon another."

In Mechanics Foundry etc. Co. v. Lynch, 236 Mass. 504, 128 N. E. 877 (1920), a strike to compel the employer to continue employment of a fellow member who had been discharged was held to be illegal, as it was in no sense for the purpose of bettering their conditions.

their relations with their employers, are the reasons why such injuries to business are regarded as incident to reasonable and fair competition. But secondary boycotts by which additional pressure is brought to bear upon the employer by inducing third persons not to do business with him because of his refusal to comply with the strikers' demands have been quite generally condemned as illegal, threats of injury to such third persons in case they deal with the employer either by calling out their men in sympathetic strikes or by other means being usually involved.[85] Peaceful persuasion without threats express or implied, inducing the employer's customers or others not to do business with the employer, gives rise to no action either at law or in equity.[86] Boycotting the goods made by an employer, by

[85] Wilson v. Hey, 232 Ill. 389, 83 N. E. 928 (1908), [notices to third persons that plaintiff was on the "unfair list," threat of injury implied]; Beck v. Railway Teamsters' Union, 118 Mich. 497, 77 N. W. 13 (1898); Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663 (1903), [the court saying: "Intimidation and coercion are essential elements of a boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done." Whether a notice to customers that the plaintiffs were "unfair" involves an implied threat or not was said to depend on the facts of each case]; Hopkins v. Oxley Stove Co., 83 Fed. 912 (1897); Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457 (1908); Gompers v. Bucks Stove etc. Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911); Rockey Mt. Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809 (1907).

[86] See cases in preceding note, expressly or impliedly so holding, also Sinsheimer v. United Garment Workers, 77 Hun 215, 28 N. Y. Supp. 321 (1894); Heithamper v. Hoffman, 99 Misc. 543, 548, 164 N. Y. Supp. 533 (1917); Henrici Co. v. Alexander, 198 Ill. App. 568 (1916); Marx & Hass Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902). See additional cases cited, Sayre, Cases on Labor Law, 467 n., also cases *contra* from Michigan, Massachusetts, Maryland and New Jersey cited in the same note. The cases differ in determining the dividing line between reasonable and fair competition and unjustified injury to the right to do business or to labor. The prevailing view sustains the secondary boycott where no force, threats or fraud is employed as lawful acts in and of themselves, the resulting damage to the employer being incidental to the struggle between employes and employer. The cases holding *contra* treat an organized boycott, which aims to injure the employer by inducing third persons, strangers to the struggle, to break off relations with him, as unfair and unreasonable acts of injury having no connection with the actual struggle, amounting in effect

the refusal of men in the union throughout the country to work on his materials when produced in a non-union shop which is included within the limits of the industry, has been sustained as a reasonable exercise of the right to determine the terms and conditions on which the men of the union will work, for their protection and the strengthening and maintenance of their union. By this means a carpenter's union may compel the unionizing of sash and trim mills, though the men actually employed in such mills are not in conflict with their employers, by preventing the sale of the output of the mills if they continue open shops.[87] The secondary boycott has been definitely sustained in California and one or two other states even though enforced by threats of sympathetic strikes against outsiders who may thus be forced to break off business relations with the employer.[88]

to the use of outside and unrelated forces to overcome the employer's resistance. Some of these cases would be sustained under the prevailing rule where fraud, force or other illegal means are used.

[87] Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917), Sayre, Cases on Labor Law, 434, the court saying: "In the case now before us if the defendants [Carpenters' Union] had called upon the public generally to discontinue using the plaintiffs' material and had sought to prevent all persons by communications, written or otherwise, from dealing with the plaintiffs, their acts would have been illegal." The court held that as the defendants had a right to decline to work in non-union shops they could also decline to handle material produced by non-union labor in shops. The outsiders thus brought into the fight must be engaged in the same industry, so that the unionizing of such shops will aid them indirectly by strengthening the union. See Bossert v. Dhuy, *supra*, also Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919).

In Massachusetts and in the federal courts strikes against the use of non-union materials are regarded as unlawful, involving a secondary boycott not justified by any direct interest of such outsiders in forcing the unionizing of the shop where such materials are produced. In some of these cases, however, the secondary boycott would be illegal under the New York rule, as bringing in workmen not included in the same industry. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917); Harvey v. Chapman, 226 Mass. 191, 115 N. E. 304 (1917); A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927); Bedford Cut Stone Co. v. Journeyman Stone Cutter's Ass'n, 274 U. S. 37, 47 Sup. Ct. 522 (1927); Irving v. Carpenters, etc., 180 Fed. 896 (1910).

[88] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908). In the Pierce case, *supra*, the court cites Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127 (1908), and

§ 49. The Modern Labor Problems; Remedy by Statute or by Decisions. It is urged that the problems involved are primarily social and should therefore be solved by legislation; that the principles of equity developed in the protection of property rights are not adequate to solve these problems, and that restraining labor in its collective actions in labor struggles by the injunction is "government by injunction," in some way an abuse of the powers of the courts.[89] But these arguments in a measure lose sight of the duty of the courts to protect the right to do business and to make a living by labor, or other activity, as a fundamental right of substance which cannot be left without protection irrespective of legislation. The great bulk of the law still is the law of the cases, as distinguished from statutory law. The development of common law and equity has been nothing more or less than the functioning of the judicial division of the government in its most important duty, *viz.*, the development and application of fundamental principles of justice and reason in the form of rules to meet the needs of a constantly growing civilization. The judiciary cannot be the mere creature of the legislature. It is a coordinate part of the state in action, just as the legislature is, and the great bulk of our law has been developed by decisions of the courts, subject to modification and control by statute.[90] Legislation may be expedient and neces-

National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902), "where the highest courts of those states formulate and adopt like principles." These cases sustain the secondary boycott as legal if limited to persuasion without threat or use of the sympathetic strike or other forceful method of compulsion against such third persons, and therefore do not sustain the extreme position of the California cases. Cases of refusal to work on non-union materials produced in the same industry involve the enforcement of a direct interest, which was not the situation in the California cases.

89 Frankfurter and Greene, Labor Injunctions and Federal Legislation (1928), 42 Harv. L. Rev. 766, 767–772; Injunction in American Labor Controversies (1928), 44 L. Q. Rev. 164, 183–193, 197.

90 The origin of the common law through the development of the King's Court in the reign of Henry II makes this clear. See Walsh, History of English and American Law, 87, 88. The development of the law of property, real and personal, of assumpsit, of torts though trespass and case, came through judge-made law very largely, affected only here and there by statutes. See chapters in Walsh, History, *supra,* under the corresponding headings. The modern development of equity in the protection of property rights and rights of sub-

sary to settle questions of policy in labor disputes, but the fundamental power and duty of the courts to protect fundamental rights of substance, only a small percentage of which are involved in labor cases, must always be recognized, subject only to modification and control by statutes.

Fundamentally, therefore, the problem must be solved by the courts, with such incidental aid that legislation may afford. The human element in the individual judge, shaped by his education and environment, must necessarily have some effect in labor cases as in other fields of the law;[91] nevertheless the development and application of fundamental principles of law based on reason and justice must always remain with the courts, leaving to legislation the making of radical changes or reforms to meet developing needs where judicial legislation is too slow. The fundamental, basic body of our law has been developed by judicial legislation through the struggle of social forces fought out in the courts. Development by statute has been sporadic and fragmentary. Whatever the defects of individual judges here and there may have been, can there be any doubt that the courts are the best possible arbiters of these struggles with the greatest freedom from class feeling and prejudice and the selfishness and shortsightedness of practical politics? Their critics have only the panacea of legislation to suggest. Legislation must have its part, and a very important part, in solving these problems, but always subject to the final word of the courts in construing and applying statutes and in the enforcement of constitutional safeguards of fundamental rights, even within the limits in which legislation may be effective.

By way of summary we may fairly say that the courts are well on their way to a final solution of the labor problem in its legal aspects. They have applied to it the fundamental principles applying to other cases of competition in trade and business, recognizing the fundamental right to make a living, or more

stance strikingly illustrates the growth of law by judicial legislation.

91 See Holmes, Privilege, Malice and Intent (1894), 8 Harv. L. Rev. 1, 8, and Scrutton, The Work of the Commercial Courts (1921), 1 Camb. L. J. 6, 8, each commenting on the effect of economic sympathies in the judge, and the danger of his education, environment and social position affecting his judgment in labor litigation, quoted in Frankfurter and Greene, *loc. cit. supra* note 89 (1928), 44 L. Q. Rev. 164, at 183, n. 11.

than a living, by any kind of activity, by labor, profession or business; recognizing the right of each in the struggle of life to compete with others to further his individual interests, but limiting this right of competition in any line of activity to what is fair and reasonable. The courts have taken the only humanly possible criterion of what is unreasonable and unfair competition, *viz.*, the test of the average man, with the average qualities of mind and spirit, a convenient mode of expressing the controlling social attitude as to what is fair and unfair in competition, whether between competitors in business or between employers and employes. Those who criticise this criterion as taken from nuisance cases in equity and as being inadequate in labor disputes [92] should stand ready to suggest something better.

In applying this test to labor cases the courts have kept not merely abreast but well in the van of the enlightened progressive thought of the time. The cases reviewed above show a remarkably liberal development in the last thirty or thirty-five years. The right of labor to unite and to enforce collective bargaining as to terms and conditions of labor by the strike, and the primary boycott is everywhere established. The secondary boycott is generally allowed if limited to persuasion without force or violence or threat of injury through the sympathetic strike or otherwise. It is quite apparent that the rule in New York, permitting strikes against neutrals provided they are engaged in the same industry as the members of the union involved, is rapidly becoming the accepted view, based upon the reasoning of Justice Holmes and Justice Brandeis in their dissenting opinions in some of the earlier cases, that collective bargaining requires unionizing of the entire industry, and therefore strikes against open shops, or the boycotting of materials produced in such shops, provided they are identified with the same industry,

92 Frankfurter and Greene, *loc. cit. supra* note 89 (1928), 44 L. Q. Rev. 164, at 178. The analogy to nuisance cases in the Debs case, 158 U. S. 564, 591–2, 15 Sup. Ct. 900 (1895), was drawn from cases granting injunctions against public nuisances. The best considered modern cases, such as Jersey City Printing Co. v. Cassidy, quoted from *supra* note 71, apply the test of the average man used in nuisance cases as the test of whether or not the defendant has so used his property as to unreasonably interfere with the plaintiff's right to enjoy his adjoining property. Probably Professor Frankfurter's criticism is not directed against this latter analogy.

are in fair competition as essential to the lawful purposes of the union. Surely the secondary boycott, and the sympathetic strike as incident thereto, cannot be permitted to extend to unrelated fields of industry. This would mean the power of all labor to combine in a single great union and enforce its demands against any employer by a power which would be irresistible, substituting government by unions for government by law through the courts.

The situation in the federal courts must be summed up very briefly. Decisions holding that the Sherman Anti-Trust Law forbidding combinations in restraint of trade between the states applied to labor unions, which were enjoined from strikes or boycotts interferring with interstate trade[93] led to the Clayton Act[94] which provided that the anti-trust laws should not be construed to forbid labor organizations and their members from lawfully carrying out their legitimate objects and purposes, and that such organizations should not be held to be illegal combinations in restraint of trade under the anti-trust laws. This was construed by the courts as applying only to cases of legitimate union action, and where the contention is that the purposes or methods of the strike or boycott are illegal, which is generally the case, the federal courts have jurisdiction to restrain interference with interstate trade by unlawful strikes, boycotts or other union activity in violation of the fundamental law.[95] The federal courts also get jurisdiction in these cases where the case arises between citizens of different states. The Judiciary Act of 1789 provided that in such cases the "laws" of the state where the federal courts sits shall control, and this provision is still part of the law.[96] By interpreting this as applying only to state statutes and not to the common law of the

[93] Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908); Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911). See Frankfurter and Greene, *loc. cit. supra* note 89 (1928), 44 L. Q. Rev. 164, 168–176, for an able review of the federal cases and statutes.

[94] 38 Stat. 730 (1914), 15 U. S. C. 12 (1926).

[95] United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922); United Leather Workers v. Herkert, 265 U. S. 457, 44 Sup. Ct. 623 (1924) and other cases cited, Frankfurter and Greene, *loc. cit. supra* note 89 (1928), 44 L. Q. Rev. 164, at 172 n. 46.

[96] U. S. Code Tit. 28, § 725 (1926).

state, the federal courts have applied their own interpretation of the common law, often in conflict with the law of the states where the court is sitting.[97] In labor cases the federal courts, as we have seen, have been definitely against strikes or boycotts intended to extend the power of the union over employers generally engaged in the same or closely allied industries, while the tendency in the state courts except Massachusetts and one or two other states is to allow action of this kind as fair competition.[98] Employers, naturally, have brought their actions in the federal courts whenever possible, and the freedom with which injunctions have been granted in these cases has created so much criticism and ill-feeling that a further curb upon the jurisdiction of the federal courts in labor cases is now pending in Congress.[99]

Corrective development by the courts themselves is indicated by the decisions. In the Hitchman Coal Co. case[100] union organizers were enjoined from soliciting and inducing men employed by the plaintiff from joining the union because the plaintiff had exacted from each employe an agreement that he would not become a member of the union while in the plaintiff's employment. In addition to holding that the union representatives should be enjoined from bringing about a breach of contract by the plaintiff's employes, though there was no definite term of employment, the court held also that the plaintiff should be protected in the right to the labor of its employes as a business right of substance. However, it must now be regarded as settled law that extending the union to non-union shops, mines or other groups by peaceful persuasion is legal where the employes are not induced to break existing contracts. It may fairly be argued that no fundamental difference exists between contract rights and business rights, such as the plaintiff's right

97 See Frankfurter and Greene, *loc. cit. supra* note 95, at 172–175, containing a careful review of the cases.

98 *Supra* notes 85 and 86.

99 For an illuminating discussion of this proposed legislation see Frankfurter and Greene, *loc. cit. supra* note 89 (1929), 42 Harv. L. Rev. 766. This article is in substance the concluding chapter of a book recently published entitled The Labor Injunction, which also contains a full and authoritative treatment of the subject matter of this section.

100 Hitchman Coal Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 114 (1917).

to the labor of its men employed at will; that the right to compete might therefore be a justification for inducing breaches of contract of employment as well as for causing loss to the plaintiff's business by inducing his men to quit work. As a matter of logic the court's argument leads to that result. In a later decision the Supreme Court seems to recognize the essential unfairness of the Hitchman case, in refusing to enjoin a union from efforts to unionize a shop within the same industry, distinguishing the Hitchman case as turning on "the unlawful and deceitful means used" by the defendants in that case.[101] After stating that the right of labor to combine and to strike is settled everywhere Judge Taft said: "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood." Though this statement is limited to local unions, it is clear that exactly the same argument applies to a union of coal miners covering coal fields widely separated in different states, or to any other unionized industry extending far beyond any single community where failure to maintain union terms and conditions in any considerable part of the industry tends to defeat organized labor in the same industry elsewhere by directly affecting competition between employers and in other ways. On this point Justice Brandeis, in a dissenting opinion in Duplex Printing Press Co. v. Derring,[102] said: "When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found." He differed with the majority in "deciding a question of fact upon the evidence introduced and matters of common knowledge. . . . that the defendants and those from whom they sought coopera-

101 American Steel Foundries Co. v. Tri-Cities Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921) per Taft, Ch. J., at 211.

102 254 U. S. 443, 41 Sup. Ct. 172 (1921).

tion have a common interest which the plaintiff threatened." Can we not see in these cases clear evidence of the law's growth, the more liberal views of men like Justice Holmes and Justice Brandeis gradually becoming law by acceptance of principles which a developing social life makes necessary?

Employers may exact agreements from their employes that they will not join a union during their employment, but whether equity should give effect to such agreements is another question. Professor Frankfuter says of them:[103] "The rapidly increasing use of the so-called 'yellow dog contracts' has grown into a serious threat to the very existence of labor unions. In view of the inequitable conditions that surround the formation of such agreements and the unfair division of their obligation, to apply to equity for their enforcement is to disregard the fundamental ethical foundations of courts of chancery." These contracts are an attempt to array the courts and the law on the side of organized industry against the principle of collective bargaining through labor organizations by making use of the rule that inducing breaches of existing contracts is unfair competition. Every time such an agreement is enforced under this rule the court becomes a party to a plan to block the development and success of collective bargaining through organized labor, taking definite sides with organized capital in its struggle against the organization of labor. The key to the situation is the doctrine that inducing breach of existing contracts is unfair competition. But when such contracts are exacted as part of the struggle between capital and labor, solely for the nefarious purpose of lining up the courts against the extension and success of collective bargaining (they are of no other possible advantage to the employer), there ought to be no hesitation in deciding that inducing the breach of such contracts is privileged in this struggle. In New York the courts have not yet decided this question. They have held that such an agreement made by employes at will is not binding because of lack of consideration, and therefore will not be enforced[104] and that "whatever rule we may finally adopt, there is as yet no precedent in this court

103 Frankfurter & Greene, *loc. cit. supra* note 89 (1929), 42 Harv. L. Rev. at 779.

104 Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). See quotation from this case *supra* note 78.

for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent . . . is to extend its influence."[105] A statute providing that the requiring of such a contract by interstate carriers from their employes was a crime, has been held to be void as in violation of the Fifth Amendment forbidding laws which would deprive a person of liberty or property without due process of law.[106] A similar state statute has been held unconstitutional under the Fourteenth Amendment.[107] The proposed legislation now before congress will have to hurdle these formidable barriers. A holding by the courts that inducing the breach of such contracts in contests to extend the organization of labor in an industry are privileged as fair competition would be a final solution of this problem far more effective than legislation. In any true sense public policy is the foundation of all law. The settlement of conflicting claims between social factions is, of course, a matter of civil or private law, and the adjustments that must be made to meet the many complicated and varying situations that must arise between capital and labor can far better be accomplished by law developed through decisions than by legislation secured by political action, here as throughout the entire field of civil or private law. The claim that questions of public policy are primarily for the legislature is altogether too broad.[108]

[105] In Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65; 159 N. E. 863 (1928), the court declined to interfere with efforts of the national union to induce the plaintiff's employes to join because only an understanding not to do so existed, not a valid contract, irrespective of the threatened injury to the plaintiff's business. The court expressly refused to say whether inducing breach of such a contract would be allowed, or whether urging the men to conceal the fact of joining the national union would be justified.

[106] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[107] Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915).

[108] Frankfurter & Greene, *loc. cit. supra* note 89 (1929), 42 Harv. L. Rev. 766, at 779.

CHAPTER X

EQUITABLE PROTECTION OF PERSONAL RIGHTS

§ 50. Reasons for Denial of Specific Protection of Personal Rights. It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier cases holding that equity will protect property rights only.[1] Business rights of all kinds discussed in the preceding chapter are not property in the legal sense. Nevertheless they are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting property rights in lands or chattels. In the usual cases of torts arising from violations of purely personal rights the reasons for denying relief in equity are clear. It is obvious that the injunction is not needed to restrain threatened assaults, disturbances of the peace, and other petty interferences with the person. The criminal law and the police afford all the relief required in such cases.[2] It is clear that injunctions in negligence cases would be absurd.

We have seen that equitable relief against torts involving injury to property is comparatively a modern development, and protection of rights of substance in business is a development of

1 See Chapter IX, *ante*.

2 Examples of trespass cases involving petty matters of this kind are Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703 (1888), [insistence by a discharged employee that he remain at the employer's plant. The court thought calling a policeman would be sufficient]; Randall v. Freed, 154 Cal. 299, 97 Pac. 669 (1908), [disturbance of the peace by defendant who made a scene, called names, etc., and threatened to do the same "whenever he chose." Putting him under bonds at law to keep the peace would, no doubt, be adequate].

Threatened assault will not be restrained because the remedy at law is adequate. Montgomery & W. P. R. R. Co. v. Walton, 14 Ala. 207 (1848); Ashinsky v. Levenson, 256 Pa. 14, 100 Atl. 491 (1917), [granting injunction restraining defendant from entering synagogue and interfering with use of this property, but refusing to enjoin insults to the rabbi].

the immediate past which is still in full motion. After centuries of inaction equity has slowly but steadily extended specific relief in tort cases, at first in protecting strictly property rights, later extending this protection to business rights as rights of substance though not constituting property in the strict sense. It is not surprising that the principle should have been laid down repeatedly by the courts that equity will never interfere to protect purely personal rights.[3] Where relief at law is just as inadequate in cases of personal torts as is such relief in cases of torts to property, there is a strong tendency in the later cases to extend equitable relief to those cases just as such relief has been extended to protect property rights and rights of substance. Surely damages is an inadequate remedy in cases of libel and slander since the injury resulting from loss of business or personal reputation cannot be measured with any accuracy, and generally the payment of damages can never make good the wrong done. Prevention of the threatened wrong where irreparable injury will result is as superior to damages after the wrong is committed, as it is in cases of irreparable or continuous injuries to property or to business rights in which

[3] Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896), has been often cited for this proposition. The court sustained a demurrer to the bill, though it charged that the defendant had caused the plaintiff to be shadowed by detectives for a considerable time, causing him great inconvenience, interfering with his social and business engagements and damaging his credit financially, and that he intended to continue the same conduct. The court quoted the *dictum* of Lord Eldon in Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818): "The question will be whether the bill has stated facts of which the court can take notice as a case of civil property, which it is bound to protect." The court also quoted from Bispham, Equity (5th Ed.), 584, n. 2, and Kerr, Injunctions, 1, 2, to the effect that equity will not interfere in cases of merely personal injuries not interfering with property rights. See criticism of this case by Pound, Equitable Relief against Defamation and Injuries to Personalty (1916), 29 Harv. L. Rev. 668, 669. He said: "If there was a legal wrong in this case, the legal remedy was an action on the case for damages, and it is a mockery to say that a court which could give no other relief is fully competent to redress the wrong." See note to this case in (1912), 37 L. R. A. 783 and review thereof, Pound, *supra*, 670–673. See Long, Equitable Jurisdiction to Protect Personal Rights (1923), 33 Yale L. J. 115; also Chafee, Does Equity Follow the Law of Torts (1926), 75 U. of Pa. L. Rev. 1, 6 *et seq.*

equity has interferred. A beginning has been made by restraining defamation of business and business rights in certain cases.[4]

In England the movement to restrain defamation where relief at law would be inadequate has gone far. Personal rights have secured some protection in some cases in which the right of privacy is recognized. There are a number of scattered decisions and *dicta* which tend to support injunctions in equity to protect purely personal rights, sometimes under the guise of protecting property or contract rights, and sometimes frankly on the ground that personal rights should receive specific protection in equity where damages would be inadequate, exactly as property rights are protected. What has been accomplished, and the principles involved, must now be considered in more detail.

§ 51. **Equitable Relief Against Defamation.** The earlier cases, based on a *dictum* of Lord Eldon,[5] refused to enjoin libel or slander because equity will protect property rights only, and will deny such protection to personal rights of reputation, even though business or professional reputation is involved, resulting in the most direct way in injuries to the right to do business or to make a living by professional service or by ordinary labor. In a case of this kind in which the alleged libel was a pamphlet tending to impeach the financial position of an insurance company[6] the court said: "It is attempted to give a color to the

[4] See § 51, *post.*

[5] Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818). Lord Eldon restrained the publication of the plaintiff's letters by the defendant in protection of the plaintiff's property in them as compositions, though it was evident that their value for publication as literary compositions was nominal. It is generally true that equity intervenes to prevent injury to property only when it is irreparable in the sense that money damages would be inadequate. It should be evident that nominal damages at law would be adequate in this case if protection of the plaintiff's property right of publication was all that was involved. It follows that what Lord Eldon really did was to restrain a malicious publication of her private letters threatened by her deceased husband's adopted son, involving injury to her feelings and possibly some loss of reputation, using the technical property right in the letters to justify equitable intervention.

[6] Prudential Assur. Co. v. Knott, 10 Ch. App. 142 (1875).

application by saying that these are libelous publications which will injure property . . . ; that the company in its trade will be injured, and that, therefore, the interference of the court is asked for the protection of property. But with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations, which have an effect upon their character and upon their trade or business, or their character as connected with trade or business; but no case can be produced in which, in those circumstances, the Court of Chancery has interfered.'' In other words, injury to business arising from personal injury to reputation will not be restrained in equity for much the same reason that a threatened physical injury to a man will not be restrained as an injury to property, although it will incapacitate him from engaging in his trade, profession or business. It is true that the most important element of damage in personal injury cases is the loss arising from interference with the ability of the injured man to work in his trade or business. If the injury from defamation cannot be adequately compensated in money damages, the same reasons exist for equitable relief by way of prevention irrespective of whether the damages arise from interference with business or earning capacity or from loss of social position and injuries to feelings—indeed damages are far less adequate to compensate the latter class of injuries. The opinion above quoted tends to overthrow any such distinction, as the injuries are purely personal though resulting in loss of business or employment, but no reason is given, apart from the authority cited by the court, why equity should not give preventive relief where damages at law are so clearly inadequate, though protection of property is not directly involved.

The authority of Prudential Assurance Company v. Knott has been in effect overruled by the Judicature Acts of 1873.[7] Dean

[7] See Bonnard v. Perryman (1891), 2 Ch. 269, 1 Cook, Cas. Eq. 626, and cases therein discussed, outlining the history of this development in England, and holding that in an action to recover damages for libel an interlocutory injunction will not be granted unless the plaintiff has made out so strong a case of unjustified libel that a jury could not reasonably find in favor of the defendant. See cases cited by Dean Pound, Equitable Relief Against Defamation (1916), 29 Harv. L. Rev. 665, notes 70, 71, 72. He points out that an injunction

Pound, in the article referred to in the last note, asserts in reference to this statement of the effect of the English Statutes above referred to: "In truth the good sense and sound instinct of the English courts led them to strain a point in order to rid themselves of the doctrine of Prudential Assurance Company v. Knott." He argues that the English Statutes, like the American codes merging law and equity, merely extended the power to grant injunctions to the courts in actions at law, without changing in any way the equitable principles on which such injunctions should be granted, and therefore the argument of the English cases above referred to, that discretionary power to grant injunctions at law was created by the Statute of 1854 free of the limitations by which injunctions in equity were governed, which was extended to the Chancery Division of the High Court of Justice by the Act of 1873, cannot be supported. In other words, the English courts have established the principle of enjoining libels in proper cases for equitable relief through the subterfuge of a statutory interpretation which cannot be sustained. It is a fundamental principle of statutory merger of law and equity under the Judicature Acts and American codes that substantive law and equity are merely brought together for administration by a single court, combining legal and equitable powers, to the end that each case may be settled in its entirety in a single action by applying to the facts the principles of law and equity, but without change of the rules at law or the principles of equity.[8] It is held under American codes that the power of the judges in common law actions to grant injunctions is the same power which courts of equity had prior to the merger, subject to the same principles. But the English courts do not assert an unlimited discretion to grant injunctions in personal actions at law. They refuse the injunction if there is any real doubt that a tort is threatened, and it must be clear that damages would be inadequate. In other words they are bound by the general principles of equity in granting injunc-

will issue against repeated or republished libels after a jury has found them to be libelous, citing Saxby v. Easterbrook, 3 C. P. D. 339 (1878); Halsey v. Brotherhood, 15 Ch. D. 514 (1880), 19 Ch. D. 386 (1881); and that temporary injunctions are granted when the libel is clearly established, "exactly as in case of any other tort" citing several English cases.

[8] See Chap. IV, *ante*.

tions in these cases. Dean Pound's argument implies that they are not so bound, because they refuse to follow the doctrine that specific relief will not be granted against personal torts. It would seem that in granting such relief the courts are merely putting into effect the statutes which expressly provide that such relief may be granted to protect purely personal rights in law actions. To that extent the statutes change the law.

In the United States, an early decision in New York[9] refused an injunction to restrain an outrageous personal libel, which involved no injury to property or business rights, for the reason that freedom of speech and of the press guaranteed by American constitutions forbid injunctions against libels, following Blackstone's theory that freedom of speech and liberty of the press mean that libelous publications cannot be restrained in advance; they must be dealt with after publication as torts or crimes or both.[10] This theory was an outgrowth of the final collapse of the censorship in England over printed publications which followed the invention of printing and continued till near the end of the seventeenth century.[11] The lapsing of the censorship was regarded as establishing freedom of speech and of the press as a natural right, and it became part of the Bill of Rights of the American Constitutions. Dean Pound hits the weakness of Blackstone's theory when he points out that if the law-making power is free to penalize as it pleases any publication after the act, it may impose penalties which will prevent publications violating any standard which may be established by statute, in effect reimposing the censorship. Cooley states the doctrine of this provision of the constitutions as complete immunity from legal censure and punishment as well as liberty to publish so long as the publication does not violate the rules of law governing defamation, substituting control by law according to common law principles for arbitrary restriction by censorship or legislation.[12] This view is sustained by the weight of authority. It is difficult to understand how Blackstone's theory can be

9 Brandreth v. Lance, 8 Paige 23, 34 Am. Dec. 368 (1839), 1 Cook, Cas. Eq. 620.

10 1 Bl. Comm. 152–153.

11 Walsh, History of English and American Law, 399–401.

12 Cooley, Constitutional Limitations, 441, 442, quoted by Pound, *loc. cit. supra* note 3, at 651.

treated seriously, and it has little well-considered support.[13] Under Cooley's theory there is no reason why equitable relief by injunction should not be given to prevent defamation which is contrary to law, as freedom of the press does not apply to such publications. Where libelous publications are used as part of a plan to destroy a business or to accomplish unlawful intimidation of employes or an unlawful boycott, there seems to be no question in most of the cases about the power of the courts to enjoin the publication, though obviously contrary to Blackstone's doctrine.[14] The constitutional difficulty raised in Brandreth v. Lance, may fairly be regarded as no longer a serious bar to equitable relief under the modern cases on this subject.

The real difficulty is the prejudice against equitable protection of purely personal rights. In England the makeshift statutes of 1854 and 1858 providing for equitable relief in law cases and legal relief in equity cases, which proved to be unworkable and were followed by the Judicature Acts of 1873, merging law and equity in much the same way as under American codes, incidentally gave the opportunity for a statutory construction by which equitable relief against defamation was put on much the same basis as equitable relief against torts to property or business rights.[15] Do the codes give a basis for a like construction in the United States? The power to grant injunctions in law cases under the

[13] In addition to Brandreth v. Lance, *supra* note 7, see Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902). See *dicta* supporting Blackstone's doctrine in Commonwealth v. Blanding, 20 Mass. 304, at 313 (1825), quoted in Dean Pound's article cited *supra* note 3, and in Patterson v. Colorado, 205 U. S. 454, at 462, 27 Sup. Ct. 556, at 558 (1907). See, however, U. S. Supreme Court cases cited in note following. Blackstone's theory seems definitely rejected in Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919), (1928), 41 Harv. L. Rev. 526.

[14] Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492 (1911); Cœur D'Alene, etc., Mining Co. v. Miners' Union, 51 Fed. 260 (C. C. Idaho 1892); National Life Ins. Co. v. Myers, 140 Ill. App. 392 (1908); Shoemaker v. South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280 (1893); Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701 (1907), and other cases cited by Pound, *loc. cit. supra*, note 3 at 655, n. 41.

The labor cases in note 22 *post* are based on this constitutional bar to injunctive relief, on construction of the more specific provisions of the constitutions in those states.

[15] See *supra* note 7.

codes arises from general statutory provisions for preliminary injunctions in actions of every description, legal and equitable.[16] Do these statutes expressly extend the remedy of injunction to the protection of purely personal rights, overthrowing the hesitancy of equity to grant relief in such cases, or do the judges in such cases act as courts of equity granting equitable relief in a merged system of law and equity without change in the substantive rules determining when equitable relief shall be granted? If we take the first view we may fairly say that specific relief is extended to protection of personal rights, changing to that extent the substantive rules of equity. But this specific relief is not to be granted as a matter of arbitrary judicial discretion; it will be allowed in accordance with the principles of equity by which equitable relief is given in protection of rights of property and of substance, the only substantive change being the overthrow of the clearly unsatisfactory position of equity that specific relief will not be given to protect merely personal rights, irrespective of the inadequacy of damages at law. This view of the matter meets the criticism by Dean Pound of the modern English cases, discussed above, by eliminating the idea that the statutes in question give entire freedom to the judges to grant injunctions in personal actions of tort and contract at law. In reality their discretion is limited in such cases exactly as is the discretion of judges in equity cases, by the general principles of equity, except that the prejudice against injunctions restraining personal torts is overcome by positive law extending such relief to the protection of purely personal rights where the remedy at law is inadequate according to settled equitable principles.

There seems to be no definite assertion of this modern English doctrine by any American court. Nevertheless the leading American cases have gone a long way toward establishing the rule that libels resulting in injury to business will be restrained. In view of the modern doctrine now thoroughly established that

[16] Dean Pound refers to codes in code states as giving the courts combining legal and equitable jurisdiction power to allow injunctions in the course of legal proceedings. Pound, *loc. cit. supra* note 3 at 665, citing Richmond v. Dubuque R. Co., 33 Iowa 422, 476 (1872), as holding that courts of law in such cases are controlled by the equitable principles which control courts of equity in like cases. See provisions of codes as to preliminary injunctions.

equity will enjoin unfair competition and unjustified injuries to business and business rights as rights of substance,[17] it is difficult to understand how any other view can be taken with any degree of consistency. Surely direct injury to business by means of a libel is unfair competition if published by a competitor, and is an unjustified and therefore malicious injury to business when done by a non-competitor. By weight of authority it may now be regarded as settled law that the publishing of false attacks in bad faith upon the validity of the plaintiff's patent will be restrained when the result will be substantial impairment of the plaintiff's business,[18] though the publication of such attacks in good faith as notice to the trade of the defendant's claim to an earlier patent may be sustained as reasonably justified.[19] For the same reason threatened gross libels against the defendant's business as a means of extorting money by a former employe have been enjoined.[20] In boycott and strike cases it is well settled in most jurisdictions that the court will enjoin libels used as part of a general plan to destroy or injure

17 See *supra* note 1.

18 Emack v. Kane, 34 Fed. 46 (N. D. Ill. 1888), 1 Cook, Cas. Eq. 631. See subsequent federal cases following this case cited by Pound, *loc. cit. supra* note 3 at 655, latter part of note 41.

19 Kidd v. Horry, 28 Fed. 773 (E. D. Pa. 1886), Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95 (D. Mass. 1886), distinguished in Emack v. Kane, *supra* note 18.

Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69 (1873), is directly opposed to the doctrine of Emack v. Kane and the later cases, the court treating the question as settled by authority—but without discussion of the principles involved. As the demurrer admitted that a legal tort existed, with serious injuries to business as a right of substance for which damages would be surely inadequate, the case must be regarded as wrongly decided, unless it can be supported on Blackstone's theory of the liberty of the press discussed above. The weight of authority and principle is in accord with Emack v. Kane.

In Howell v. Bee Pub. Co., 100 Neb. 39, 158 N. W. 358 (1916), the court refused to restrain the publication of a letter written by the plaintiff a considerable time before, but afterwards recalled, in which he stated that he would not be a candidate for governor of Nebraska, the publication being made for political effect, falsely, with knowledge that the statement had been withdrawn, because it interfered only with a political right. The opinion expressly reserves the question of protecting property or personal rights and the concurring opinion of Sedgwick, J., is highly significant.

20 Nat. Life Ins. Co. v. Myers, 140 Ill. App. 392 (1908).

the plaintiff's business. If the act will result in unfair or unjustified injury to the plaintiff's business as incident to the general plan it will be restrained though it be a libel, just as an act causing irreparable injury to property will be restrained though it be a crime.[21] In these cases the courts have gone much further than to restrain the libel in spite of its being a libel. They regard a libel used in a labor dispute to injure the employer's business as unfair competition because it is a libel.[22] So a libel of a patent right, if not privileged, will be restrained, as explained above. The only remaining difficulty is to extend the remedy to cases of injury to personal reputation in which direct injury to business or property rights is not involved.

Loss of personal reputation in the great majority of cases results in loss of earning power by interfering with the success of the man injured in his business, profession or trade whether he be an independent business or professional man, or an employe working on a salary or wage basis. In these cases there is every reason for granting equitable relief on account of the inadequacy of damages at law, which justifies the granting of such relief in cases of direct libels of a business or business rights such as patents. The proximate result of the libel is loss of business or earning power, even though accomplished by injury to personal reputation. If this be granted, it would be futile and highly unreasonable to refuse to go the full way by restraining gross and unjustifiable personal libels or slanders in the few

[21] See *supra* note 14. It is clear that the libel is restrained in these cases because it will cause injury to business for which money damages would be inadequate. This must be true where the libel alone causes such damage as where the libel and other wrongful acts together cause that result. If it causes irreparable injury to business, a right of substance, it will be restrained even though a libel, just as an act causing irreparable injury to land will be restrained though a crime.

[22] Harvey v. Chapman, 236 Mass. 191, 115 N. E. 304 (1917); M. Steinart & Sons Co. v. Tagen, 207 Mass. 394, 93 N. E. 584 (1910); Philip Henrici Co. v. Alexander, 198 Ill. App. 568 (1916). See also Martineau v. Foley, 231 Mass. 220, 120 N. E. 445 (1918). *Contra:* Marx & Haas Jean Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902); Lindsay & Co. v. Montana Fed. of Labor, 37 Mont. 264, 96 Pac. 127 (1908). These cases are based on expressed constitutional provisions in those states that "every person may freely speak, write or print on any subject, being responsible for the abuse of that liberty."

cases in which loss of business or earning power may not be involved, it being clear that damages in such cases must be purely speculative—a kind of punishment which the jury may inflict—and that an injunction preventing the wrong is in every respect a superior remedy. As the theories on which Brandreth v. Lance, Prudential Assurance Company v. Knott and Boston Diatite Company v. Florence Manufacturing Company, and the cases following them, were decided, have been proved to be mistaken, there being no constitutional bar to injunctive relief, and no bar because a libel is involved, provided an injury to a right of substance exists, we may hope that the American cases will follow the English cases in taking this final step and grant injunctive relief against unjustified defamation where damages would be inadequate, though only personal loss of reputation is involved. If the empty prejudice against equitable protection of merely personal rights is regarded as a bar, the courts may construe the code provisions above referred to in the thirty code states and territories, and similar statutes in several of the remaining states, as extending the principle of equitable protection to personal rights in tort and contract cases.

Fox's Libel Act[23] provides for the determination by a jury of questions of fact in defamation cases, and it has sometimes been said that this statute precludes relief in equity until an unprivileged libel has been found to exist by verdict of a jury in a law action.[24] In the United States the constitutional guaranty of trial by jury is involved. But equitable relief against defamation under the modern English cases is given only where the libel is so clear that a verdict by a jury to the contrary would be set aside as contrary to the evidence. Obviously this involves no violation of the principle of jury trial in cases of defamation.[25] Applying the same principle in the United States there can be no question of violating the right of trial by jury under American constitutions or statutes similar to the Fox Libel Act. After the libel has been established by the verdict

[23] 55 Geo. III, c. 42.

[24] Fleming v. Newton, 1 H. L. Cas. 363, at 376, 9 Eng. Rep. 797, at 803 (1848).

[25] Bonnard v. Perryman [1891] 2 Ch. 269, 1 Cook, Cas. Eq. 626.

See Act of 1873, § 625, subsec. 8, granting power in all cases "in which it shall appear to the court to be just or convenient that such order should be made."

of a jury, surely no objection of this kind exists to injunctions against threatened republications of the libel. Jury trial as a matter of sound policy in defamation cases may be regarded as an established principle whenever existence of an actionable libel is uncertain.

§ 52. Equitable Protection of Purely Personal Individual Rights. In the preceding section we have seen how far the courts have gone in England in protecting purely personal rights in cases of defamation, and how the chief objections to such protection in the earlier American cases have been overcome where the defamation will result, through loss of reputation, in injuries to the business or earning capacity of the person defamed. It is true that in most of these cases the defamation was a direct attack on the business of the plaintiff, as in the labor dispute cases, or upon a business right recognized as property in the cases of false statements as to the validity of patents; nevertheless injuries to business and earning capacity are bound to result in the great majority of cases from serious loss of personal reputation due to unjustified defamation. It is logical to expect that the courts will extend relief in equity to these cases where damages would be inadequate, as exactly the same reasons exist therefor as in the cases above referred to in which equity has given relief. If this position be taken the true nature of the supposed rule that equity will not protect purely personal rights is disclosed as a mere prejudice based on a haphazard development of the cases rather than on any controlling principle.

We have seen that in Gee v. Pritchard, Lord Eldon protected purely personal rights by his injunction, as the right of publication of the letters was a property right of nominal value which equity would ignore if protection of property alone was involved.[26] We find many examples in which the courts have been quick to seize upon a highly technical and essentially fictitious property right as a basis or excuse for protecting purely personal rights. Thus in Edison v. Edison Polyform Mfg. Co.,[27] the defendant was restrained from an unauthorized use of the

[26] See *supra* § 51.

[27] 73 N. J. Eq. 136, 67 Atl. 392 (1907).

plaintiff's name and picture in advertising and selling a medicine called "Polyform" on the technical ground that he had a property right in his name, though the argument of the court clearly establishes that the true reason was the protection of his personal right of privacy. Admittedly no injury to any competing business of the plaintiff was involved. How can a man's name as a property right of substance be violated except by interfering with a business conducted in his name by a competitor trying to steal or injure his business by using his name? The court refers to an English case[28] in which the defendant was restrained from advertising a cycle as "The Times Cycle," and from representing that the London Times was connected in his venture, on the ground that the Times might possibly be held responsible in connection with the defendant's business. This shadowy and preposterous "liability" or "possible liability," seems to supply the injury to a property right which induced the court to grant the injunction. The New Jersey court recognizes clearly enough that the property right may be of insignificant value in these cases, as in cases of unauthorized publication of letters or photographs, and it is entirely clear that like Lord Eldon in Gee v. Pritchard, the court used it in reality as an excuse for protecting the plaintiff's personal rights of privacy which had been grossly violated by the defendant.[29]

[28] Walton v. Ashton [1902] 2 Ch. 282. To the same effect, Routh v. Webster, 10 Beav. 561, 50 Eng. Rep. 698 (1847).

[29] The court said, 73 N. J. Eq. 136, at 142, 67 Atl. 392, at 394 ". . . the insignificance of the right from a pecuniary standpoint does not always bar relief. Thus the report of an association of dentists [N. J. State Dental Soc. v. Dentacura Co., 57 N. J. Eq. (12 Dick) 594], the exhibition of one's photograph (Pollard v. Photographic Co., 40 Ch. Div. 345), and the publication of a private letter, which, as a literary production may be worthless (Falson v. Marsh, 2 Story 100 [Fed. Cas. No. 4901]; Boosey v. Jeffreys, 6 Exch. 583), are accorded the same protection as the lectures of a professor (Abernethy v. Hutchinson, 3 L. J. Ch. 209), the catalogue of a prince's etchings (Prince Albert v. Strange, 1 Macn. & G. 25), and the currency of a foreign state (Emperor of Austria v. Day, 3 DeG. & J. 217). I think that under the above authorities the complainant in the present case is clearly entitled to an injunction to restrain the unauthorized use of his name, his picture, and his certificate. The possibility of injury because of their use without apparent objection on Mr. Edison's part is quite as great as it would have been in the 'Times' case. . . ." It may be observed that possible personal liability on

In another New Jersey case decided the same year the court decreed the cancellation of a birth certificate naming the plaintiff as the father of the child, based on the false statement of the mother, wife of the plaintiff, who had left him and had been living in adultery with a third person for over two years.[30] There can be no doubt that in this case threat of injury to substantial rights of property was involved, as the fraudulent certificate created a *prima facie* case of the plaintiff's paternity which might result in fixing liability for the child's support on the plaintiff, and might interfere seriously, not only with the inheritance of his property, but with his right to dispose of it by will. Judge Dill said: "If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion."[31] It is evident that in-

Mr. Edison's part to those taking the medicine or having business dealings with the defendant were at least as fanciful and absurb as was the pretended possible liability in the Times case. See, however, Edison v. Thomas A. Edison, Jr., Chemical Co., 128 Fed. 957 (D. Del. 1904), denying an injunction against the use of the name "Edison" and the word "wizard," even though defendants were injuring Mr. Edison's business reputation and causing him damage by causing the public to believe that he was engaged in selling worthless and inferior articles. This case is opposed to extending equitable relief against defamation where damage to business results from loss of personal reputation, as distinguished from direct attack upon the plaintiff's business.

Cases in which the courts have enjoined the wrongful use of the names of fraternal organizations and social clubs are another illustration of how the courts use an alleged property right as an excuse for protecting the standing of the club and its members from injury by others, possibly undesirable persons, masquerading as members by using the name of the club for their organization. Supreme Lodge, etc., Loyal Order of Moose v. Improved Benevolent, etc., Order of Moose, 98 N. J. Eq. 598, 131 Atl. 219 (1925); Grand Lodge, K. P. of N. & S. Am. v. Grand Lodge, K. P., 174 Ala. 395, 56 So. 963 (1911); B. P. O. Elks v. Improved B. P. O. Elks of the World, 205 N. Y. 459, 98 N. E. 756 (1912); State ex rel. Great Am. Home Sav. Inst. v. Lee, 288 Mo. 679, 233 S. W. 20 (1921); (1926) 35 Yale L. J. 752.

30 Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (1907).

31 *Ibid.* at 919, 67 Atl. 92, at 100, citing Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68

jury to the plaintiff's property rights was a remote contingency, the controlling reason for the injunction being the wanton and fraudulent attack upon the personal rights of the plaintiff. A New York case which denied the existence at law or in equity of the right of privacy and refused to restrain the publication of the plaintiff's picture for advertising purposes, led to the enactment of a statute providing for the recovery of damages and relief by injunction against unauthorized use of a person's "name, portrait or picture for advertising purposes or for purposes of trade."[32] The right of privacy as a legal right has been sustained in later cases holding that damages may be recovered for unauthorized use of a portrait or photograph.[33]

(1905), and approving of the dissenting opinion of Gray, J., in Roberson v. Rochester Folding Box Co., 171 N. Y. 538, at 557, 64 N. E. 442, at 448 (1902), "a case seldom cited but to be disapproved, the force of which was subsequently removed by statute, Laws N. Y. 1903, p. 309, c. 132."

32 Roberson v. Rochester Folding Box Co., *supra* note 31. The statute, also cited in the previous note is now §§ 50 and 51, N. Y. Civil Rights Law (Cons. Laws c. 6). This has been held as not applying to newspapers and newsreels in publishing news. Jeffries v. N. Y. Evening Journal Pub. Co., 67 Misc. 570, 124 N. Y. Supp. 780 (1910); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1919).

33 Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905), [approved by Judge Dill in Vanderbilt v. Mitchell, *supra* note 28, in connection with his disapproval of the Roberson case); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918), [to same effect]. See Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W. D. Mo. 1912), denying an injunction restraining defendant from selling chocolates under the name of "Vassar Chocolates," with imitation of the college seal, etc., on the boxes. Though the court refused to recognize the right of privacy, the case turned on the view that the matter was petty, with no substantial harm to Vassar College; that in any event no such right existed in a public institution of this kind; that the use of the name and seal involves no wrong unless loss of business results.

Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909), like the Pavesich case, *supra*, sustained the recovery of damages at law, for unauthorized commercial use of the plaintiff's photograph. *Contra:* Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97 (1909); Hillman v. Star Pub. Co., 64 Wash. 691, 117 Pac. 594 (1911), the later case involving no commercial use of the photograph. See Larremore, The Law of Privacy (1912), 12 Col. L. Rev. 693; Warren and Brandeis, The Right of Privacy (1890), 4 Harv. L. Rev. 193.

Will equity refuse to intervene if

Cases in which injunctions have been granted restraining the defendant from further acts tending to alienate the affections of the plaintiff's wife[34] or from further debauching of the plaintiff's minor daughter[35] involve protection of a technical right of substance in the husband's or father's right to the services of his wife or daughter, a purely technical basis of the liability at law for damages in such cases, having no relation to the actual punitive damages which are given by the jury. It is clear that the injunction was granted in each of these cases to protect the plaintiff's personal rights from injuries for which damages would be clearly inadequate, not because of this right to services. As Dean Pound says[36] it is a serious question whether injunctions in such cases should be granted because it is doubtful

at law in the same jurisdiction the right of privacy is not recognized? See Chafee, Does Equity Follow the Law of Torts? 75 U. of Pa. L. Rev. 1. Professor Chafee establishes that in cases of legal waste, cases of inducing breach of contract, cases of removal of cloud on title, cases of protection of the rights of members in clubs and similar associations, equity gives relief though no relief exists at law. An additional well known illustration is the enforcement of parol contracts by equity prior to the development of assumpsit. Prof. Chafee's conclusion is abundently supported and fully justified that equitable action is not based on liability at law, but proceeds independently. In many cases, equity has led the way in important reforms in which the law eventually concurred.

34 Ex parte Warfield, 40 Tex. Cr. R. 413, 50 S. W. 933 (1899).

35 Stark v. Hamilton, 149 Ga. 227, 99 S. E. 861 (1919).

36 Pound, Equitable Relief Against Defamation and Injuries to Personalty (1916), 29 Harv. L. Rev. 674, n. 99. In Hodecker v. Stricker, 39 N. Y. Supp. 515 (1896), the court refused to enjoin the defendant from holding herself out as the wife of the plaintiff's husband with whom the defendant lived in illegal relation. No injury to property or right of substance was involved. The personal status of the plaintiff was affected by the false claim of the defendant that she was the wife, casting doubt upon the plaintiff's position as wife, and consequent loss of reputation and social position. It is evident that these constituted purely personal rights, and as no pretended property right was involved, equitable relief was refused as well as damages, no claim for alienation of affections being made. If no liability at law existed here, would an injunction be granted under the English rule? Probably not.

In Burns v. Stevens, 236 Mich. 443, 210 N. W. 482 (1926), the court enjoined the defendant from claiming to be the plaintiff's wife and from using plaintiff's name. No property right was asserted even as a pretended basis for the court's action.

whether they would accomplish anything. Since injunctions against immoral conduct open such a wide field of possible litigation with so much doubt of effective results, and strong probability that the administration of the law might be made an object of ridicule, we may be quite sure that it will not be found expedient to extend equitable relief in these cases of injuries to family relations. Nevertheless these cases are evidence of the movement in equity toward protection of merely personal rights.

Social rights of members of clubs and similar organizations are protected by injunction if a contract or property right, no matter how slight, can be found as an excuse.[37] In California

[37] In Rigby v. Connol, 14 Ch. D. 482 (1880), Pound, Cases on Equitable Relief against Defamation and Injuries to Personalty, 153, Jessel, M. R., after referring to card clubs, scientific associations without property meeting at members' homes and taking subscriptions, said: "I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service . . . or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy—in such cases no Court of Justice can interfere so long as there is no property the right to which is taken away from the person complaining." No property right being claimed by complainant the action was dismissed. To the same effect is Baird v. Wells, 44 Ch. D. 661 (1890). Slight property rights, the loss of which might easily be compensated by money damages, satisfies the technical jurisdictional objection, and the court proceeds to protect the complainant in his personal rights of membership, provided he has been deprived of membership unfairly and in violation of the rules of the club or association. Mesisco v. Giuliano, 190 Mass. 352, 76 N. E. 907 (1906); Froelich v. Musicians Mutual Ben. Ass'n, 93 Mo. App. 383, 1 Cook, Cas. Eq. 663, and other cases cited in Pound, Cases on Equitable Relief against Defamation and Injuries to Personalty, 54 n. See also Pound, Equitable Relief, etc. (1916), 29 Harv. L. Rev. 640, 677–679. Surely protection by injunction in equity of nominal or nearly nominal property interests in the assets of the association, or in future contingent sick or burial benefits, the value of which is largely offset by the member's freedom from dues if his expulsion stands, is not justified if personal rights are not involved. Would equity intervene in the case of the petty card club if the twelve members had contributed $24 for prizes during the winter season? The wrongly excluded member's remedy in damages would surely be adequate, and the injury to his feel-

and New York the constitution and by-laws of the club or association are held to be a contract between the member and the association, and if the expulsion is in violation of the constitution and by-laws, either by denying a right to be heard provided for therein, or by a finding after such a hearing in bad faith, the contract will be specifically enforced by a negative injunction restraining the expulsion.[38] The personal rights of the

ings in such cases would be too petty a matter to call for an injunction, though he had a $2 interest in the prize fund. In other cases expulsion from social or fraternal or trade organizations may go far toward wrecking the complainant's prospects in life. Can there be any doubt in such cases that his very slender interest in the assets of the organization, in which he would probably never realize anything in some future indefinite winding up of its affairs, is a mere excuse, satisfying the supposed rule that a property interest must be involved, protection of the personal rights of the member being the real purpose of the courts? See statement by Jessel, M. R., in Fisher v. Keane, 11 Ch. D. 353 (1878), that "the character and prospects in life of any member of this club may be irremediably blasted" by hasty casual action of a committee of the club, quoted by Pound, *loc. cit. supra* (1916), 29 Harv. L. Rev. at 678 n. It would seem to be time to cast aside this technicality and grant the relief which justice requires though no property right exists.

38 Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897); Krause v. Sander, 66 Misc. 601, 122 N. Y. Supp. 54 (1910); Pound, *loc. cit.* (1916), 29 Harv. L. Rev. 680. Dean Pound speaks of these cases as protecting this "contract of membership" as an asset, presumably, of the members in the association. But these cases do not purport to protect the contract as property. They enforce it specifically because damages for its breach would be inadequate. That a contract does exist for breach of which damages may be recovered at law can hardly be denied. Is this remedy adequate where ouster from a club for alleged disgraceful conduct will cause injuries which money damages will do little to remedy? The courts may be trusted to refuse injunctions in petty cases in which the complainant may be left to his remedy at law, in the exercise of the discretion according to which a judge in equity always acts. But where the remedy at law is really inadequate there would seem to be no good reason why these contracts should not be enforced specifically by enjoining improper dismissal of the member. This eliminates the need of finding a property interest in the assets of the association, as a technical or pretended basis for protecting the substantial personal rights of the member. The objection to specific enforcement of contracts of personal service, viz., that as a practical matter such enforcement cannot be effectively accomplished, does not apply, as a negative injunction restraining the expulsion of the member and the denial to him of

members are protected because damages at law for breach of the contract would be inadequate, in close analogy to injunctions to enforce negative promises in contracts for personal service, where the services are of unique value so that damages would be an inadequate remedy, the purpose being to enforce indirectly the affirmative contract of service.[39] Dean Pound, in the article referred to above,[40] criticizes the granting of equitable relief in these cases because it would involve too heavy a burden for courts of equity to assume the duty of reviewing the decisions of boards of voluntary associations of all kinds. This criticism applies, of course, no matter on what theory the courts act. To the extent that contract rights exist in these cases for which damages at law would be clearly inadequate the duty of equity to act must be regarded as quite the same as in other contract cases. From the standpoint of the subject-matter of this chapter the important point is that personal rights are protected in equity, either on the theory of specific performance of contracts, or after satisfying the jurisdictional requirement of a technical property right, as in the other cases discussed

privileges of membership is all that is required.

The English and many American cases review the expulsion of a member and enjoin the expulsion if he has not been given a fair hearing or opportunity to make a defense, irrespective of what the rules of the club may be, or if he has been expelled in violation of the rules of the club, or if the expulsion after trial and formal compliance with the rules has been made in bad faith without reason. Fisher v. Keane, 11 Ch. D. 353 (1878); Dawkins v. Antrobus, 17 Ch. D. 615 (1881); Labouchere v. Earl of Wharncliffe, 13 Ch. D. 346 (1879), reported or quoted Pound, Cases on Equitable Relief, etc., 55–61. On page 61 n., he cites American cases as taking the same position generally in the following situations: (1) Expulsion without notice or reasonable opportunity to make a defense, whatever the rules may be; (2) Expulsion in violation of rules; (3) Malicious expulsion. By almost unanimous authority the courts will intervene under such circumstances. In England and some of the states, however, a technical property interest in the assets must be found. Several of the cases so cited quite obviously turn on the contract theory of the California and New York cases. The contract of membership is the test in all of these cases, and specific enforcement is what is actually given, whatever the theory of the court may be. If the contract theory is accepted the result would be to drop altogether the requirement of a technical property right of the member in the assets of the corporation.

39 See § 66, *post*.

40 (1916) 29 Harv. L. Rev. at 680.

above in which purely personal rights have been protected on the basis of a similar pretense of protecting property rights.

Political rights, such as the right to vote at elections or primaries, rights of individuals in the organization of political parties, rights to public office, and political questions such as the legality or illegality of elections, of the constitutionality of statutes affecting elections, organization of parties, offices, and the machinery of government generally, do not fall within the field of relief in equity because as a practical matter relief in equity would be unworkable and unnecessary in most cases, and if a legal wrong is involved relief at law is adequate.[41]

It is evident that disputes involving primaries and nominations to political office, as well as other matters of party procedure and discipline, cannot, as a practical matter, be reviewed in equity. Political controversies of these kinds may best be left to the voters for settlement.[42] Where, however, the validity

[41] In Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683 (1894), 1 Cook, Cas. Eq. 657, an injunction to restrain the county clerk from issuing notices of an election under a statute claimed to be unconstitutional was refused in two suits, one brought by a voter and the other by a candidate for office, on the ground that the rights involved were purely political. The court cites Sheridan v. Colvin, 78 Ill. 237 (1875), as refusing to restrain the mayor and council from enforcing an ordinance reorganizing the police department for the same reason; also Dickey v. Reed, 78 Ill. 261 (1875), in which the court held as absolutely void a temporary injunction restraining city officials from canvassing an election upon the question of whether the city would become incorporated under the general incorporation act, so that the officials, in violating the injunction, did nothing for which they could be punished in contempt proceedings. In any event this position was not valid, as the court has undoubted power to act, and its injunction should have been obeyed, though it would have been vacated on appeal as improperly granted. See People ex rel. Gaynor v. McKane, 78 Hun 154, 28 N. Y. Supp. 981 (1894), in which an injunction in a similar case was held to be valid until set aside on appeal, and contempt proceedings thereunder were sustained. An injunction to restrain the mayor and committee of a city in Nebraska from removing an officer for malfeasance in office was held to be absolutely void, however, in *In re* Sawyer, 124 U. S. 200, 8 Sup. Ct. 482 (1888), as falling entirely outside the powers of a court of equity, just as punishment of a crime by injunction would be. See to same effect, Payne v. Emmerson, 290 Ill. 490, 125 N. E. 329 (1919), and comment thereon (1920), 29 Yale L. J. 655.

[42] Winnett v. Adams, 71 Neb. 817, 825, 99 N. W. 681 (1904), quoted from Pound, *loc. cit.* (1916), 29 Harv. L. Rev. 681 n. 116.

of some political action must be determined in order to decide the existence of a property right the courts do not hesitate to act, as the "property right" which gives equity undoubted jurisdiction is present.[43]

The merger of law and equity in code states, bringing together *mandamus* and *quo warranto* at law with the injunction in equity as remedies to be used as justice and expediency demand by a single court which is both a court of law and equity, has resulted in the use of the injunction in cases involving questions of government affecting the sovereignty of the state and the rights of the people, just as *mandamus* and *quo warranto* are used, the injunction being used to restrain excess on the part of public officials in the discharge of their duties just as *mandamus* is used to supply defects and to compel performance of official acts.[44] That this development, making use of the best and most appropriate remedies to meet the situation, irrespective of their labels at law or in equity prior to code merger, is based on reason and common sense can hardly be doubted.

It has been urged with great force that where the political interests of the people are involved, as in a local option election, and no remedy is provided at law by statute or otherwise to test the validity of such an election in which fraudulent voting was charged, equity may extend its relief to such cases under its general powers to meet new situations unknown to the courts of earlier times. In such a case[45] the court said, after pointing

43 Coleman v. Board of Education, 131 Ga. 643, 63 S. E. 41 (1908).

44 In State v. Cunningham, 83 Wis. 90, 53 N. W. 35 (1892), applying Art. 7, § 3, Const. of Wis., which gives to the Supreme Court jurisdiction "to issue writs of habeas corpus, mandamus, injunction, quo warranto, and other original and remedial rights, and to hear and determine the same," the court said: "Inasmuch as the use of the writ of injunction, in the exercise of the original jurisdiction of this court, is correlative with the writ of mandamus, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial, and affect the sovereignty rights and franchises of the state, and the liberties of the people." This case is distinguished in Fletcher v. Tuttle, *supra* note 41, as based upon the merger of law and equity in a single court in Wisconsin.

45 Town of Pagosa Springs v. People, 2? Colo. App. 479, 130 Pac. 618 (1913). See also People v.

out that special elections to determine local option and like matters were unknown in earlier periods: "If, under the early practice of courts of equity, they assumed the right to meet every new situation, wherein the law was inadequate, and extend their jurisdiction to new subjects or controversies not previously known to have been of equitable cognizance, what good reason can be given why modern courts of equity may not follow the same practice? The very gravamen of the case at bar is fraud. . . . " The court held that an injunction be granted restraining the defendant officials from issuing licenses for the sale of liquor and requiring them to revoke those already granted, it having been established that the majority in favor of license had been secured by fraudulent votes.

The protection of public interests in equity in an action in behalf of the people against public nuisances which endanger the public health and morals, involving the protection of no property right, is definitely established law.[46] There is a close analogy in these cases in which political rights of the public are directly involved where no remedy exists at law, or where the legal remedy is clearly inadequate. Surely jurisdiction in the sense of power to act exists in the courts of equity in these cases. The exercise of that power should be strictly limited to cases where the public interest demands its exercise, and petty matters of party politics as a matter of expediency should be left to party organizations and to the voters. In most cases of violations of political rights the remedy at law, by *quo warranto* or *mandamus,* is adequate. Where that is not true, protection of public rights may demand the injunction in equity, and no good reason seems to exist why it should not be used.

Tool, 35 Colo. 225, 86 Pac. 224 (1905).

[46] See Ch. VIII, *ante.*

CHAPTER XI

JUDICIAL DISCRETION IN GIVING OR DENYING EQUITABLE RELIEF. BALANCING OF EQUITIES.

§ 53. **The Principle of Judicial Discretion in Equity.** The history of equity starts with the exercise of the king's prerogative of grace to do justice in hard cases in which no adequate relief could be had in the courts of law regularly administering justice. The Chancellor, acting as the representative or committee of king and Council, gave the same kind of relief and administered the same kind of supplementary justice, based upon reason and conscience.[1] We must take it as beyond any real doubt that the "reason and conscience" which guided the Chancellor was not his individual arbitrary notion of what justice demanded, but rather his conception of justice in accordance with the prevailing reason and conscience of the time. This is illustrated by the development of equitable relief in the enforcement of uses, of parol contracts where debt would not lie, of equitable relief in cases of fraud and mistake, and against forfeitures and penalties. The fundamental principles back of equitable action were developed in these early cases of the fifteenth and sixteenth centuries.[2] It is true that cases as precedents were not followed as they are today—that was true to a very considerable degree of the common law of the period of the Year Books also, as we find the courts of law seeking and following principles rather than mere cases as precedents[3]—but Chancery undoubtedly developed and applied a system of equitable principles which was followed in a quite definite way, demonstrating the falsity of the notion that the Chancellor had or claimed to have the power to determine arbitrarily according to his individual conscience what justice demanded in each particular case.[4]

1 See § 3, *ante.*

2 See §§ 4, 8, *ante.*

3 See Plucknett, Concise History of English Law, Book I, latter part.

4 See § 8, *ante.*

There is no difference, other than a difference of degree, between this exercise of judicial discretion by the early Chancellors acting in the place and stead of king and Council and deciding whether reason and conscience demanded special intervention in accordance with equitable principles, and the granting of equitable relief by the modern judges in equity cases. The principles of equity have been greatly extended and systematized, and definite rules governing their application have been developed which are binding on courts of equity just as rules at law established by decisions are binding on courts of law. But equitable relief has always been special relief, supplementing or modifying relief at law. It is still true that the judge in equity stands as the representative of the state to give relief in hard cases, modifying the rigor of hard and fast rules at law where reason and conscience demand it. In the last analysis this function must depend upon the sound discretion and good judgment of some representative or representatives of the state. We find it illustrated in the pardoning power of the chief executive of the state or nation. In the field of equity it must of necessity reside in the judge in equity. The history of equity and the nature of equitable relief, therefore, give the reasons for the rule which has always prevailed that in every case in equity the court in its discretion may refuse equitable relief even though all requirements for such relief are established according to admitted equitable rules, if under the facts of the special case reason and conscience require that relief be denied, or be given only on stated terms and conditions.[5] Thus if a purchaser of land has delayed his action for specific performance in order to find out whether the property will increase in value or not, and after waiting a considerable time, he starts his action after the property has greatly increased in value, equity refuses specific performance under this always reserved discretionary power.[6] So in an action of partition between tenants in

[5] Story, Equity Jurisdiction, §§ 161, 742, 766, and cases in notes following.

[6] Groesbeck v. Morgan, 206 N. Y. 385, 99 N. E. 1046 (1912). Judge Willard Bartlett said: "No doctrine of equity jurisdiction is better settled than the rule that specific performance is not a strict legal right, and is never granted when the lapse of time renders such relief inequitable in its consequences, or, as many judges have phrased it, against 'equity and good con-

common, the plaintiffs were denied partition of the land unless they would at the same time make a final distribution of their father's personal estate, justice demanding a final distribution and division of the father's estate, real and personal, among the children in accordance with his will.[7] The maxim "He who comes into equity must do equity,"[8] the doctrine that the plaintiff must come into equity "with clean hands"[9] as well as

science.' In determining whether such delay is fatal in the domain of equity, regard must always be had to the peculiar circumstances of each case. Peters v. Delaplaine, 49 N. Y. 362. . . . As was said of a purchaser by Chancellor Kent in Benedict v. Lynch, 1 Johns. Ch. 378: 'He cannot be suffered to lie by and speculate on the rise of the estate!' " As to laches and the Statute of Limitations as defenses to specific performance, see § 102, *post.*

7 Barrell v. Barrell, 25 N. J. Eq. 173 (1874).

8 See Williams v. Fitzhugh, 37 N. Y. 444 (1868), and Buckingham v. Corning, 91 N. Y. 525 (1883), recognizing the general rule that a mortgagor seeking the cancellation of the mortgage for usury or other illegality will be denied relief unless he does equity by tendering and paying into court the amount advanced on the mortgage by the mortgagee with legal interest, modified in New York by a statute which relieves the "borrower" of this duty in cases of usury, the statute not applying to any part of the debt not affected by the usury, nor to a devisee or heir of the mortgagor or "borrower," also cases holding that after tender of the mortgage debt on the law day, the mortgagor seeking to have the mortgage canceled by an action in equity must keep the tender good by depositing the amount thereof in court to the credit of the mortgagee, since coming into equity he must do equity. Kortright v. Cady, 21 N. Y. 343 (1860); Tuthill v. Morris, 81 N. Y. 94 (1880); Frost v. Yonkers Sav. Bank, 70 N. Y. 553 (1887). See also, People v. Freeman, 110 App. Div. 605, 97 N. Y. Supp. 343 (1906), holding on the same principle, that a tenant seeking relief from forfeiture for breach of condition in failing to pay rent must pay all rent due, though the recovery of part of it at law might be barred by the statute of limitations.

9 This doctrine is based on the principle that equity will not act to give equitable relief to a man who has been guilty of fraud or other illegality in connection with the same matter, though such relief would regularly be given otherwise. See as illustrations of the application of this doctrine, Chicago & N. W. Ry. Co. v. Railroad Comm. 175 Wis. 534, 185 N. W. 632 (1921); Rubel Bros. v. Dumont Coal Co., 200 App. Div. 135, 192 N. Y. Supp. 705 (1922); Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312 (1916); A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Med. Co., 43 Ind. App. 213, 86 N. E. 1025 (1909); 1 Cook, Cas. Eq. 782–794. For an extreme application see Weeghman v. Killifer, 215 Fed. 289 (1914), holding that the plaintiffs

the doctrine of laches illustrated in the specific performance case above referred to, all turn on the principle of the reserved power of equity to deny relief where under the special facts justice demands that relief, usually given in such cases, be withheld. Another illustration of this principle is the refusal of the courts to enforce specially a negative restrictive covenant in a deed of conveyance of land where changed conditions of the neighborhood have ended the purpose of the restriction, and its enforcement would do the plaintiff no good.[10]

§ 54. **Judicial Discretion in Tort Cases.** The most important application of this principle to cases of equitable relief against torts arises where injunctions are sought against trespass or nuisance, and all the requisites for granting equitable relief are present, but relief is denied because the harm done to the defendant would be so disproportionate to the benefit gained by the plaintiff that reason and justice require that the plaintiff be left to his remedy at law. The more important problems which have arisen in these cases will now be considered.

§ 55. **Balancing the Equities in Trespass Cases.** A trespasser who has trespassed by accident or mistake in erecting a building on his land so that it extends a few inches on the adjoining land of the plaintiff, will not be compelled to tear down and remove the building or such part of it as encroaches where the cost thereof would be very great as compared to the value of the strip of land so occupied by the encroachment. Though a clear case of continuing trespass exists for which the only relief at law, if ejectment should be impracticable, would be successive suits for damages, and therefore equity would intervene normally to prevent a multiplicity of suits, nevertheless equitable relief compelling the removal of the encroachment is denied because of the disproportionate loss to the defendant which would result.

could not have specific performance of a negative promise by a professional baseball player to play for the plaintiffs "and no other party" solely because he had a gentleman's agreement, obviously unenforceable, to play for the Philadelphia Club for the same season at a salary to be agreed upon. The plaintiffs' conduct in employing him seems to have been regarded as unethical, though clearly within their legal rights.

10 See § 100, notes 24, 25, *post*.

This disproportion must be very great. Equity will not lightly deny to the plaintiff the right to recover his land in specie and compel him to accept a money equivalent instead. Whether or not this disproportion is sufficiently great will rest in the sound discretion of the court.[11] But where the amount of land

[11] In Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901), the defendants' twenty story building overhung the plaintiff's property by 1½ to 4¾ inches. To remove the wall would cost probably $250,000. The decree provided for payment of $5000 to plaintiff on his granting an easement to defendant to maintain the wall. The court followed Trustees v. Thatcher, 87 N. Y. 311, and other cases holding that restrictive covenants will not be enforced in equity when changed conditions make their enforcement inequitable, asserting that exactly the same principle is involved. To same effect, the wall encroaching three to ten inches, Goldbacher v. Eggers, 38 Misc. 36, 76 N. Y. Supp. 881 (1902), aff'd without opinion, 82 App. Div. 637 (1903), and again 179 N. Y. 551 (1904), and Botsford v. Wallace, 72 Conn. 195 (1899). In Pile v. Pedrick, 167 Pa. 296, 31 Atl. 646 (1895), the court by mandatory injunction required the defendant to remove stones in the foundation so far as their ends projected into the plaintiff's land, which was about 1½ inches, though plaintiff refused to allow defendant to enter on his land for that purpose, making it necessary to demolish the entire wall, no part of which above the foundation encroached on plaintiff's land, a good example of the injustice done in enforcing the strict legal right of the plaintiff in disregard of the disproportionate loss to the defendant. In Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56 (1911), the encroachment resulted from the defendant's negligence in locating the line without having a survey made, and therefor the court decreed the removal of the building. An encroachment by building a foundation about 2½ feet within the land of the plaintiff over which the defendant had a private right of way resulted in a mandatory injunction for its removal in Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448, 89 N. E. 534 (1909), it appearing that the defendant did this with full knowledge and that he erected the building thereon after being warned by plaintiff that the encroachment would not be allowed. The principle of "balancing the equities" was applied in Lynch v. Union Inst. for Savings, 159 Mass. 306, 34 N. E. 364 (1893), the court referring with approval to Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17 (1888), and several English and New York cases in which mandatory injunctions to remove slight encroachments were denied because of the disproportionate injury to the defendant. The court modified the mandatory injunction originally granted by allowing the defendant to retain the vault which it had erected within the limits of the basement which the plaintiff held under a short lease on giving to the plaintiff in return space equally valuable to the plaintiff in another part of the basement.

so taken is trifling, and its loss will affect very slightly the character and quality of the plaintiffs remaining land and its value, and adequate compensation may be made by a money payment, it would be highly inequitable for the court to order the removal of the encroachment where such removal would cause a heavy loss to the defendant, having no reasonable relation to the value of the strip of land covered by the encroachment. The question is purely a matter of remedy. The doctrine of transfer of title by accession, where raw materials are converted into a finished manufactured product many times more valuable than the raw material wrongfully converted by the defendant, is a close analogy. The owner of the raw material cannot recover the finished product or its value, but is limited to the value of the raw materials at the time of the conversion, because the recovery of the finished product would impose a heavy penalty on the defendant having no relation to the actual damage sustained.[12] Just as the owner of the raw material is forced to accept as damages the value thereof at the time of the conversion and is not permitted to recover the finished product as his property, so the owner of the strip of land taken by the encroachment is not permitted to recover it, but is limited to the recovery of its value in the equity action on condition that he convey it to the defendant. The plaintiff's right in equity to recover his land by mandatory injunction is forced to give way when its enforcement would mean an exceedingly disproportionate and unjust penalty enforced against the defendant, when recovery of the value of the land by the plaintiff would approximate very closely an entirely just result. Illustrations appear in the notes.[13] The most important objection to these cases is

The discretionary character of equitable relief is clearly illustrated in this case.

12 Walsh, Property (2d Ed.), 794, and cases there cited and discussed.

13 In Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17 (1888), the strip of land encroached upon by defendant's building was worth $10. The court said: ". . . the manifest object of this proceeding being to compel the defendant to pay an exorbitant price for the narrow strip of land upon which, through mutual mistake, her two houses are partly situate, and which is comparatively valueless except for purposes of litigation, or subject her to great inconvenience and expense in removing the buildings, equity will not aid in this attempted act of oppression. . . ." In Tucker v. Howard, 128 Mass. 361 (1880), the damages to plaintiff would be $200; cost of removing the encroachment $530. A mandatory injunction was

that a kind of eminent domain for private purposes is involved, depriving the plaintiff of his property against his will.[14] The argument that the injury to the plaintiff is slight, adequately compensated by money damages, is met with the statement that the plaintiff's technical right may be very valuable, in that he may be able to secure from the defendant whatever price he cares to impose for its surrender in whole or in part.[15] These are reasons why the doctrine should be applied with great caution, and only where reason and justice demand it, in the sense that the enforcement specifically in equity of the plaintiff's legal rights would be unreasonable and unjust according to the gener-

sustained. See also Gimbel v. Milwaukee, 161 Wis. 489, 154 N. W. 998 (1915), noted (1916), 16 Col. L. Rev. 351. The court in Behrens v. Richards, [1905] 2 Ch. 614, denied an injunction to restrain defendants from using paths over plaintiff's land in reaching the shore which had been so used with the permission of former owners for a very long time. "It would, in my judgment, be a disastrous thing, not for the public only, but for the landholders also, if this court, at the caprice of the landowner entertained every trivial application to restrain persons by injunction from using paths, which, though not public highways, have in fact been used by the permission of the owners for many generations, and whose user is no injury to the owner of the land." The court gave nominal damages.

14 Thus in Tucker v. Howard, 128 Mass. 361, 363 (1880), the court said: ". . . a court of equity will not allow the wrongdoer to compel innocent persons to sell their right at a valuation," quoted in Lynch v. Union Inst. for Savings, 158 Mass. 384, 33 N. E. 603 (1893).

15 Thus in Goodson v. Richardson, L. R. 9 Ch. App. 221 (1874), Lord Selborne in granting a mandatory injunction for the removal of water-pipes from plaintiff's land, which was of little value to him because subject to a public easement of way, said: "It is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, . . . precisely the value which that power of veto upon its use creates, when such use is to any other person desirable and an object sought to be obtained." In Cooper v. Crabtree, 20 Ch. D. 589 (1882), Jessel, M. R., said: "These are cases in which there may be enormous injury to the property, though the actual damage done by the trespass is nothing; as in Bowser v. Maclean, 2 D. G. F. & J. 415. There the defendant, who was entitled to a mine, was complained of for carrying coals by an underground tramway under the plaintiff's land which he had no right to use. The trespass did no damage to the plaintiff's land, but it was an enormous injury to him, because he would compel the defendant to pay a heavy rent for wayleave." See note (1915), 15 Col. L. Rev. 537, also *post* note 24.

ally accepted standards of the community. There seems to be general acceptance of this principle in cases of slight encroachments by buildings created without wilful wrong. Yet it is clear that the objections above stated apply to them just as truly as to the situations of fact involved in the cases in which these objections were urged. It may just as truly be said that the owner of the two or three inch strip occupied by the encroachment should not be deprived of his land without his consent, and that it has great value because of his right to exact from the defendant a very high price in order to avoid the necessity otherwise of expending a still larger sum in removing the encroachment. Where the encroachment on or other taking of the plaintiff's property is wilful he is entitled to a mandatory injunction irrespective of a balancing of "equities." Where it is not wilful the refusal of an injunction in these cases is no taking of property by law for private purposes. It is simply the refusal of a remedy which would operate as so severe a penalty for an unintentional wrong as to shock the average sense of fairness and right, leaving the plaintiff his remedy of damages as more adequately meeting the demands of justice. It is clear, therefore, that each case must turn on its special facts; that the legal rights of the plaintiff will be protected and enforced by injunction in equity unless the injustice and unfairness of such relief is very evident in any particular case. It is a question for the good judgment and sound sense of the court, impossible to define by formula or rule. Results in the cases vary with the variation of facts, and with the quality of the judgment and discretion of the judges deciding the cases. Perfection here as elsewhere cannot be expected.[16]

§ 56. **Balancing the Equities in Nuisance Cases.** Most of the confusion and apparent conflict involving this doctrine are

16 Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (1925), [injunction compelling removal of encroachment granted because defendant must be taken as knowing that the building would encroach]; Tucker v. Howard, *supra* note 13; Curtis Mfg. Co. v. Spencer Wire Co., *supra* note 11; Mobile & Ohio R. Co. v. Zimmern, 206 Ala. 37, 89 So. 475 (1921), [Wilful and repeated taking of complainant's coal by the R. R. Co. Injunction granted; no balancing of equities in favor of a wilful wrongdoer]; State *ex rel.* Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254, 169 S. W. 267 (1914).

found in cases of nuisance. The defendant has established a large manufacturing plant at great expense the operation of which interferes unreasonably with the plaintiff's enjoyment of his property in the neighborhood of the plant. An injunction will result in destroying the business or compel its transfer to another location at great cost to the defendant. The damages to the plaintiff may be actually insignificant, or if substantial they may be very small relatively, a very small percentage of the damages which an injunction would force upon the defendant. The principles involved are exactly the same as in cases of encroachments and other cases of continuing trespasses in which the "equities" between the parties have been balanced as explained in the last section. In the encroachment cases, however, no intentional wrong exists; in nuisance cases the defendant must be charged with intending the usual consequences of carrying on the business. There is also involved the loss to the community if the business is destroyed by the injunction, not only to the town or city where it is located, and to the residents thereof employed in the plant, but to the general public in the loss of enterprise and wealth which destruction of the business will cause. On the other side we have the absolute legal right of the plaintiff to enjoy his home free from unreasonable disturbance, without regard to its value or the extent of the pecuniary loss that may be caused by the nuisance. There has been very much more reluctance in applying this doctrine to nuisances. In a leading New York case[17] the defendant was enjoined from polluting a stream by casting into it large quantities of waste material from its mill, the plaintiff being the owner of a farm on the stream some distance below the defendant's property. The damage to the plaintiff from the nuisance was found to be $100 per year. The defendant had an investment of over $1,000,000 in the mill, and employed 400 to 500 persons. The court said: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor

17 Whalen v. Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913), 2 Cook, Cas. Eq. 744.

defendant is a wilful wrongdoer, bound to know the effect of the nuisance for which he is answerable. To permit him to persist in the tort by paying damages would be equivalent to permitting a man to wilfully seize and build on the land of his neighbor and then, by paying damages, to acquire the property without its owner's consent. The trespass cases hold directly to the contrary. Wilfully depriving a man of the reasonable enjoyment of his home or farm is a very different matter from an accidental encroachment of a trifling kind leaving him with his property substantially as before, and with damages for the land so taken. Reason and conscience do not require the reservation of the usual relief by injunction in these cases. Neither the defendant nor his employes, nor the public generally, have the right to benefits resulting directly from a wilful sort committed by the defendant.

Nevertheless the courts of several states have refused injunctions in cases where the nuisance was undoubtedly chargeable to the defendant as wilful, because they regarded the injury to the defendant as so great as compared with the damages to the plaintiff from a continuance of the nuisance, that justice and reason demanded a remedy by way of damages instead of an injunction. In most of these cases the fact that the continuance of a great industry depended upon the court's action, involving the prosperity of an extensive community, was given very considerable weight in determining the court's decision.[21] All cases involving this question turn on the doctrine that equitable relief is not a matter of absolute right, but may be withheld in the discretion of the court where reason and justice demand, because of special facts, that damages not specific relief by injunction, be given as the better remedy.[22] The Pennsylvania

21 Such cases are Bliss v. Anaconda Copper Min. Co., 167 Fed. 342 (1909); McCarthy v. Bunker Hill Mining Co., 164 Fed. 927 (1908); Madison v. Ducktown &c. Co., 113 Tenn. 331, 83 S. W. 658 (1904). In these cases the damage [illegible] to a very small sum of money, insignificant as compared to the loss to the defendant and to the community from the ending of the industry. The courts referred to these enterprises as not only lawful in themselves, but sanctioned and encouraged by legislation.

22 In Richard's Appeal, 57 Pa. 105 (1868), in refusing an injunction restraining defendant from using bituminous coal in its blast

cases discussed in the preceding note make clear that the judicial discretion involved is not a matter of "grace" in any arbitrary sense. That expression was used in the Richards case, not in the objectionable sense imputed to it in the later cases, but quite obviously as expressing the reserved power of equity to withhold relief where reason and justice demand it, a principle recognized everywhere and thoroughly established, reason and justice

furnaces because of the "balancing of equities" between the parties, the court said: "It is elementary law, that in equity a decree is never of right, as a judgment of law is, but of grace." In Walters v. McElroy, 151 Pa. 549, 25 Atl. 125 (1892) and Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065 (1904), this principle was more clearly defined. In the latter case the court said: "A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in its court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. . . . The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other." In the Walters case the court said: "The phrase 'of grace' predicated of a decree in equity, had its origin in an age when kings dispensed their royal favors by the hands of their chancellors. . . . And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious." In these cases the nuisances were in effect destructive of the plaintiffs' property, and where that is the case the low value of the property affected was held to be immaterial. A similar criticism of this expression, involving much the same misapprehension of what the statement by the court in Richard's Appeal meant, appears in Campbell v. Seaman, 63 N. Y. 568 (1876). That each case turns on its special facts, according to which the court decides whether the injunction should be withheld as a matter of reason and justice, see Elliot Nursery Co. v. Du Quesne Light Co., 281 Pa. 166, 126 Atl. 345 (1924), commented on (1925) 73 U. of Pa. L. Rev. 208. The court approved of the decision in Sullivan v. Jones & L. &c. Co., *supra,* but refused the injunction partly because the defendant was a very large public service company, performing a public service in the best known manner; that other plaints contributed to the smoke and those living or doing business in the environs of Pittsburg must expect to submit to inconvenience from smoke in the atmosphere, making the case very different from the Sullivan case in which a private enterprise was destroying the plaintiff's property by its methods of manufacture.

according to the general sense of the community, not according to the whim of the judge, being the test.[23] The courts disagree in applying this test, just as they disagree in applying the test of the average man in the many situations in which that test is involved. The equitable principle is clear enough; its application becomes a matter of the exercise of judicial discretion in determining whether or not, under the special facts of each case, an injunction would be clearly inequitable and unreasonable according to the sense and judgment of people of average intelligence and fairness, a complicated problem of fact which different judges might well solve differently, making the arguing from prior cases difficult and often misleading.[24]

[23] See cases in preceding notes, establishing the doctrine in cases of contract, equitable easements, laches, cases involving the "clean hands" doctrine, and cases applying the maxim, "He who comes into equity must do equity," as well as cases of trespass and nuisance.

[24] Where the wrong is clear, so that the wilful guilt of the defendant is manifest, the great weight of authority is against "balancing the equities." See cases *supra* notes 17, 19, 22, also Broadbent v. Imperial Gas Co., 7 De. G. M. & G. 436; 44 Eng. Rep. 170 (1857); Imperial &c. Co. v. Boardbent, 7 H. L. Cas. 600, 4 Eng. Rep. 239 (1859); Madison v. Ducktown &c. Co., *supra*, note 21, one of the few cases refusing an injunction, though the plaintiff's properties were being destroyed, because the value of their farms was so small as compared with the value of the defendant's business, seems inconsistent with the result in Georgia v. Tenn. Copper Co., 237 U. S. 474, 35 Sup. Ct. 631 (1915) and *ibid.* 240 U. S. 650, 36 Sup. Ct. 465 (1916), in which the same nuisance was passed upon, the court finding that by taking proper steps the business could be carried on without serious damage to neighboring property owners, the decree permitting business to be continued experimentally under supervision of an inspector appointed by the court, and limiting the percentage and total amount of sulphur in escaping fumes as provided in the decree.

Where the court declines to issue an injunction because of the disproportionate damages which would result, the better course is to provide for the payment of permanent damages by the defendant on condition that the plaintiff grant to the defendant the privilege of continuing the business complained of. This relieves the plaintiff from the bringing of repeated suits at law to recover damages as they accrue. See cases in notes following treating of cases of municipal and *quasi*-public plants where the right to operate the plant, though a nuisance, may be secured by eminent domain.

Lindlay, L. J., in Shelfer v. City of London Elec. Light Co. [1894], 1 Ch. 287, gave as cases for damages instead of an injunction: ". . . trivial and occasional nuisances; cases in which a plaintiff has shown

If the nuisance is necessarily involved in the operation of a municipal or public service plant used in a public service, interfering unreasonably with the property rights of neighboring owners, an injunction is refused because private rights must give way to public needs provided due compensation is made. If such rights are not acquired by condemnation proceedings, the persons injured, as in the elevated railroad cases in New York, instead of an injunction, are entitled to the value of their property right so appropriated by the municipal or public service corporation in establishing a permanent business or activity in the public service. This value is measured by the resulting permanent depreciation to their property or "damages," and on payment of the amount the defendant corporation gains a right to continue the business causing the injury. Nuisances by interference with easements of light, air and access through the operation of elevated railroads are the most striking illustration.[25] Nuisances caused by smoke, cinders and other pollutions

that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief." In Edwards v. Allouez Min. Co., 38 Mich. 46 (1878), where the plaintiff purchased the land affected by the defendant's mining business in order to exact a large sum by a hold-up suit, he was denied an injunction for that reason. See also, Hunter v. Carroll, *supra* note 13. Compare statements in some of the cases, *supra* note 15. It ought to be clear that equity has the power to refuse to be made a party to a speculative scheme based on taking advantage of a situation such as that involved in the above case, and in cases of slight building encroachments arising by mistake. The *principle* of judicial discretion in all these cases is fully established. The limits of its operation are necessarily uncertain.

25 See Ch. VII, § 35(4), notes 55–59, *ante*, where these cases are cited and discussed. Where the right to "take" or to acquire the right to "damage" the plaintiff's property by eminent domain exists, as in the cases above referred to, it is settled law that an injunction will be denied and generally equity will provide for the payment of the value of the property taken or the depreciation in the value of the plaintiff's property due to such permanent right to damage it, in order to give final relief and to eliminate the need of repeated actions for damages as they accrue or for condemnation proceedings. In Simmons v. Patterson, 60 N. J. Eq. 385, 45 Atl. 995 (1900), the court refused an injunction restraining the defendant from discharging its sewers into the Passaic River, saying, however: "If these complainants amend their bill, or file a new bill asking for an injunction, unless the city will consent to make such compensation for the diminution in

of the air and nuisances due to the pollution of streams by the operation of municipal or public service plants, sewers, and the like, make up most of the remaining cases of this kind, and in these latter cases the true principle involved, as explained above, is not always clearly expressed in the cases, many of which hold that an injunction will be refused because injury to the public from the injunction would so greatly outweight the damage which the property owner would sustain.[26] If the nuisance is

the value of their lands as shall be found to be just, such equitable relief can be given to them.'' See earlier New Jersey cases cited in same case. This action was taken, apparently, without regard to any right of the city to acquire rights against the plaintiffs by eminent domain, for the court said that if the plaintiffs should elect to sue for damages as they might accrue ''the city would be driven to file its bill to restrain the suits, offering to make just compensation. That procedure was taken in Railroad Co. v. Kamlah, 42 N. J. Eq. 63.'' In Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622 (1903), the court issued an injunction restraining the pollution of the stream by defendant's sewers, but suspended its operation for a year, with privilege to apply for further suspensions, in order that the city might obtain ''appropriate legislation'' in case it could not acquire the right against plaintiffs by purchase or by condemnation. The statutes of each state must be consulted to determine the exact rights of municipalities and public service companies to acquire land or rights to damage land under the power of eminent domain. The modern statutes generally provide for the assessing of damages to property not actually taken, as well as the value of land taken. See application of the Illinois statute in Stetson v. Chicago & Evanston R. Co., 75 Ill. 74 (1874). In Illinois and some other states prospective damages in such cases may be recovered by action at law, making relief in equity unnecessary. See Stetson case, *supra,* also Suehr v. Chicago Sanitary Dist., 242 Ill. 496, 90 N. E. 197 (1909). In New York, New Jersey, and probably most of the other states, damages for a nuisance is limited to those accruing up to the time of the trial, making repeated suits at law necessary, which is obviated by relief in equity as regularly given. See Galway v. Met. El. R. Co., 128 N. Y. 132, 28 N. E. 479 (1891), and other cases cited or referred to above.

[26] Daniels v. Keokuk Water Works, 61 Iowa 549 (1883), is a case of this kind, the court citing and following cases of private plants as nuisances in which injunctions were refused because of the ''balance of equities'' doctrine. The serious injury to the public as compared with the slight injury to the plaintiff, readily capable of compensation by money damages, is the reasoning followed. Other cases in which public service plants were involved, but disposed of on the ''balance of equities'' doctrine rather than on the theory of the defendant's right to continue on paying ''damages,'' under the

due to methods of operating the plant or business which may be corrected, an injunction restraining such improper methods will be granted.[27] Where the nuisance is a necessary incident of the business, the best known methods of preventing damage to neighboring property being used, it is clear that the right to carry on the business may be acquired by condemnation proceedings against the neighborhood property owners exactly as in the elevated railroad cases, and when such owners of neighboring property sue for injunctions the courts recognize that fact, and accomplish the same results as condemnation proceedings by giving such "damages" as substitutional relief instead of an injunction, making the payment thereof conditional upon the grant to the defendant of the right permanently to go on with the business in the public service. This constitutes a transfer of the plaintiff's property right to the defendant for public use in return for the amount awarded him by the court, exactly as his right would pass in condemnation proceedings upon payment of its value as fixed in such proceedings. The only element of the exercise of judicial discretion in "balancing the equities" in these cases is the recognition and enforcement by the court of the defendant's right to acquire an interest in the plaintiff's property for public use under the power of eminent domain.[28]

right of eminent domain, are Elliott Nursery Co. v. Du Quesne Light Co., *supra* note 21; McCann v. Chasm Power Co., *supra* note 19; Baltimore v. Sackett, 135 Md. 56, 107 Atl. 557 (1919).

[27] In Shelfer v. City of London Elec. Light Co. [1895], 1 Ch. 287, the court said, in granting the injunction, that the defendant had not established that its plant could not be operated without causing the vibrations which constituted the nuisance. If the nuisance, as a practical matter, may be eliminated by changes in the methods of operation, it is clear that the injunction will be granted against operating except as such changes or improvements are adopted. Many of the cases in the preceding notes expressly or impliedly stand for this principle and its soundness is self-evident.

[28] See Chafee, Progress of the Law (1921), 34 Harv. L. Rev. 388, 395. Referring to these cases Professor Chafee said: "The situation is like the second group. [Viz., private plants held to be nuisances where damages to defendant from an injunction would be very great as compared with damages to plaintiff from the nuisance] except that the defendant is a public service company, municipality or other body entitled to the power of eminent domain. The taking of the plaintiff's right of enjoyment of his land is now as legitimate as the physical occupation by the defendant of the land itself, so long as proper

Another illustration of the exercise of judicial discretion in withholding equitable relief in actions of tort when the balance of injury is against an injunction is occasionally found in patent cases where the court finds that granting the injunction would cause damages to the defendant while the denial of it would do the plaintiff little harm;[29] or where the patentee is trying to extort from the defendant a sum as a license fee far in excess of a fee established as the "fixed sum" regularly charged by him for the use of his invention,[30] another illustration of the refusal of equity to lend itself through the injunction as an instrument for extortion. In the usual case, however, the patentee may fix the fee, and the defendant cannot appropriate his invention against his will at a price to be fixed by the court.[31]

§ 57. **Preliminary Injunctions.** Not only in tort cases but also in all actions in equity where justice demands it, the court may grant a preliminary injunction to maintain the *status quo* until the final disposition of the case. Whether or not such relief will be given rests in the discretion of the court. The discretion of the court in this matter is exercised on a basis somewhat different from that on which the withholding of relief in special cases, as discussed in the preceding sections, depends. In those cases the usual and regular relief is withheld because of special facts which bring judicial discretion into action in order that an unjust decree may not be made. On motions for preliminary injunctions the whole matter is to be determined in the court's discretion according to what seems fairest and most expedient, with no right as a matter of course to the injunction. It must appear that serious damage will be done tending to defeat the relief sought if the defendant is not re-

damages are paid. Therefore an injunction should be denied except to insure compensation as above. This eminent domain factor is frequently overlooked. . . . ."

29 See cases discussed by Lacombe, J., in Campbell Printing Press &c. Co. v. Manhattan Ry. Co., 49 Fed. 930 (1892); 1 Ames, Cas. Eq. 638.

30 See *dictum* in case cited *supra* note 29, also *dictum* in Sanders v. Logan, 2 Fish. Pat. Cas. 167 (1861).

31 See cases cited and discussed in Printing Press &c. Co. v. Manhattan Ry. Co., *supra* note 29, also additional cases cited, 1 Ames, Cas. Eq. 642, note 2.

strained pending the final disposition of the case. The damage *pendente lite* must be irreparable in the sense that money damages would be inadequate. Thus in trespass and nuisance cases the preliminary injunction will not be granted if damages will be adequate compensation for the threatened acts until final judgment. Where the injunction will do serious harm to the defendant by interrupting or modifying a business which may be found to be legal in every respect, while the injury to the plaintiff from the continuance of defendant's business will not be very serious the injunction will be denied. The court will hesitate to interfere with an established business charged with being a nuisance on a preliminary motion based on affidavits without opportunity to hear and cross-examine the witnesses, unless a very clear case of wrong is made out, with really serious harm threatened *pendente lite,* and where this harm has been endured for a considerable time before bringing the action, and an injunction would result in greater injury to the defendant, the court in its discretion will deny the preliminary injunction.[32]

[32] Eaden v. Firth, 1 Hem. & M. 573, 71 Eng. Rep. 251 (1863); Att'y Gen. v. Steward, 20 N. J. Eq. 415 (1869); Fitz v. Erie City &c. R. Co., 155 Pa. 472, 26 Atl. 653 (1893); Sellers v. Parvis & Williams Co. 30 Fed. 164 (1886); Maloney v. Katzenstein, 135 App. Div. 224, 120 N. Y. Supp. 418 (1909); Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 142 N. W. 434 (1913). See cases listed 1 Ames, Cas. Eq. 565n, 563n, and note (1917), 31 L. R. A. (N. S.) 881.

PART III

EQUITABLE RELIEF IN CONTRACT CASES

CHAPTER XII

SPECIFIC PERFORMANCE WHEN DAMAGES ARE INADEQUATE.

§ 58. **Nature and Purpose of Specific Performance.** The history of the development of specific performance of contract in equity appears in an earlier chapter.[1] We have seen that cases in contract formed one of the most important groups in which the chancellors of the fifteenth century gave equitable relief; that relief was given freely in cases of parol contract where debt at law would not lie, because prior to assumpsit no relief could be had at law for breaches of parol contracts where no debt for a fixed sum existed; that relief in these cases took the form of specific performance generally, but where that was impossible or impracticable substitutional relief in the form of damages was given; that when assumpsit at law gave adequate relief in cases of parol contracts equity surrendered jurisdiction in these cases, retaining jurisdiction in cases where the remedy of damages at law was inadequate. Specific performance of contracts, therefore, took form as one of the earliest and most important branches of equity, in the fifteenth century, the century in which equity as a part of the English legal system had its real beginning.[2]

Specific performance of contract has always been a matter of more adequate relief. The question presented in any case is this: Do the facts involve a situation demanding specific relief, or will substitutional relief in the form of damages instead of

[1] See *ante* § 4 (c).

[2] See *ante* § 4 (c).

performance do as well? Assuming a valid contract broken by the defendant, the actual performance of the contract will give to the plaintiff exactly what he is entitled to, with damages for the delay added. Damages for nonperformance will at best be only a substitute approximately for what the plaintiff has lost through the loss of performance. As a remedy it has all the defects of a substitute for the real thing. Nevertheless equity refused to intervene where damages were reasonably adequate. We shall see that the advantages and the basic superiority of specific relief over damages has caused a steady gain of specific performance as a remedy in contract cases, just as specific relief is constantly gaining in the field of torts.[3] With law and equity merged into a single system of law administered by a single court in England under the Judicature Acts and in thirty of the states and territories of the United States under codes of civil procedure,[4] and with a very considerable merger practically accomplished by special legislation in most of the other states, this movement is bound to go much further. In Continental Europe the Civil Law makes specific relief the normal remedy, giving damages as substitutional relief where specific relief is impossible or impracticable in whole or in part.[5] English and American law has made considerable progress in that direction. With law and equity united in a single system the question to be decided in these cases is getting more and more to be: Which is the better relief in this case, specific performance or damages? With both forms of relief equally available, a court with full power to use either or both forms as reason and expediency may require can hardly hesitate to grant specific relief when it is definitely superior to damages.

Contracts for the sale of land have been enforced specifically in equity since the fifteenth century because damages is not an adequate substitute for the specific land to which the plaintiff is entitled under his contract. Other land which he may purchase with the money recovered as damages may be very differ-

[3] See prior chapters of Part II, on equitable relief in cases of Waste, Trespass, Nuisance, Equitable Protection of Business and Similar Rights of Substance, and Equitable Protection of Personal Rights. The greater part of equitable relief in these cases of tort has developed in the last 125 years, and a very considerable part in the past 30 years.

[4] See *supra* Chapter IV.

[5] Huston, Enforcement of Equitable Decrees, Ch. III.

ent from the land he was to receive. Contracts for the sale of ordinary chattels or commodities which may be purchased without difficulty with the money recovered as damages are not specifically enforced since damages as a substitutional remedy are reasonably adequate. Specific performance is given if the chattels are unique so that they cannot be purchased in the market with the money recovered as damages. Where damages are speculative and uncertain so that the amount given cannot be determined with certainty and definiteness, specific performance is decreed, since the plaintiff should not be compelled to accept the guess of a jury for the specific thing to which he is entitled under his contract. On the other hand in many cases specific performance is impossible or impracticable for various reasons. Obviously damages, however inadequate, will be the only form of relief available in such cases. The details of these matters make up the subject matter of this and the following chapter.

It is clear, therefore, that where specific performance of a contract is sought the questions to be decided are simply these: Do the facts of this case present a situation calling for specific relief or for damages? Can specific performance be enforced effectively and will such enforcement be practicable? The field of specific performance has been greatly extended under modern cases. The former attitude of the courts, that equity will intervene only where relief at law is affirmatively defective and inadequate is giving way, and the modern attitude seems to be that specific performance will be decreed where specific relief is definitely superior to damages.

Coke insisted that either party to a contract has an option to perform or pay damages, and that specific performance enforced by the Chancellor deprived him of this right.[6] This crude standard of business morality never made any headway in the law. The power but not the right to break a contract exists, like the power to commit a crime or tort, but the breach is a wrong in

[6] In Bromage v. Genning, 1 Rolle 368, 81 Eng. Rep. 540 (1616), 1 Ames, Cas. Eq. 38, n., a prohibition against an action for specific performance was given. "And Coke said that this would subvert the intent of the covenanter, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will."

either case.[7] If the contract gives to either party an option not to perform on paying a stated amount, then the option to perform or to pay liquidated damages exists as part of the contract, and specific performance cannot be enforced.[8] The usual provision for liquidated damages gives no such option. It is a provision in advance fixing damages in case of breach, but a breach will be a wrong exactly as though no such provision existed.[9]

[7] Lynch, J., in Brown v. West. Md. R. Co., 84 W. Va. 271, 99 S. E. 457 (1919):—"The normal end or termination of every contract is performance in accordance with the agreement. . . . Lightly to permit a contracting party to disregard his obligation and compel the obligee to accept, not the thing contracted for, but money damages, is to place a premium upon contractual insincerity."

Story, Equity Jurisdiction (13th Ed.), § 717a, cited in Curtis Bros. v. Catts, *post* note 35 and Johnson v. Brooks, *post* note 36: "It is against conscience that a party should have a right of election whether he should perform his covenant or only pay damages for the breach of it. But on the other hand there is no reasonable objection to allowing the other party who is injured by the breach to have an election either to take damages at law or to have specific performance in equity." All the cases allowing specific performance are necessarily opposed to Coke's position, the only question being the extent to which specific performance will be allowed. Story's statement that the plaintiff may elect between damages and specific relief as against the wrongdoer is a general principle applying to cases in tort, such as waste, trespass and nuisance, as well as to contract cases.

See similar quotations from opinions, *post* note 42.

[8] Dills v. Doebler, 62 Conn. 366, 26 Atl. 398 (1892); Lyman v. Gedney, 114 Ill. 388; 29 N. E. 282 (1885); Barrett v. Geisinger, 179 Ill. 240, 53 N. E. 576 (1899); Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808 (1922). For list of cases turning on construction of specific provisions see 1 Ames, Cas. Eq. 724, n. 3, and 32 A. L. R. 584. Prof. Cook points out (2 Cas. Eq. 14 n.) that the position taken in Bartholomae &c. Brewing Co. v. Modzelewski, 269 Ill. 539, 109 N. E. 1058 (1915), that specific performance of a negative contract will not be given where liquidated damages are provided for, is opposed to a long line of cases in Illinois and to nearly all the cases in other states. A few other cases hold that damages are proved to be adequate by such agreements for liquidated damages, though it is clear that their purpose is simply to remove uncertainty as to the amount of damages in case of a breach, without affecting the question of their adequacy. See Cook, *ibid.;* Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118 (1891) and Primm v. White, 162 Mo. App. 594, 605, 142 S. W. 802 (1912), holding that the fixing of damages by the parties themselves established their adequacy.

[9] See cases in preceding note, also

§ 59. **Contracts for the Sale of Land.** Equity has always enforced contracts for the sale of land because the contract gives to the purchaser the right to that specific parcel of land, and any damages which he might recover at law is not adequate, as any other parcel of land which he might purchase will differ in location and characteristics from the land to which he is entitled under the contract. Land has a unique value in that it cannot be exactly duplicated in another parcel, and this is true irrespective of its value or adaptability for use. The importance of land at law is illustrated by the assize of novel disseisin and the other real actions, followed by ejectment, by which the specific thing, the land, could be recovered by its owner, the one outstanding case of specific relief at law,[10] as compared with actions against wrongful takers of chattels who could be held only in damages recovered in actions of trespass and later in trover.[11] When assumpsit developed at law for breach of contract, growing out of case for deceit,[12] it is clear that any remedy other than damages for breach of contracts for the sale of land was quite impossible at law, courts of law being without the power by *in personam* procedure to compel specific performance of the contract. By that time the jurisdiction in equity had been fully established to enforce such contracts specifically.

The fact that the subject-matter of the contract of sale is land, irrespective of its value or the purposes for which it was purchased, gives the right to specific performance because of the inadequacy of damages at law, just as the fact that land is involved gives the right to specific relief by ejectment at law though the money equivalent is all that can be recovered as against wrongful converters of chattels.[13] Contracts for the sale of trees to be re-

Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161 (1917); Kansas Wheat Growers v. Schulte, 113 Kan. 672, 216 Pac. 311 (1923).

10 Walsh, Hist. Eng. & Am. Law, 99–107.

11 *Ibid.*, Ch. XIV.

12 *Ibid.*, 416–420. See *ante* § 4(c).

13 Thus in Kitchin v. Herring, 42 N. C. 190 (1851), the court said: "The principle is, that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity." See list of cases to same effect, 36 Cyc. 552.

Cases like Hazelton v. Miller, 25 App. D. C. 337 (1905), holding that specific performance will be refused because the plaintiff had contracted to sell the land at a profit and therefore his profit as damages

moved by the purchaser, though falling within the Statute of Frauds as contracts for the sale of land, do not come under this rule of specific performance, since what the purchaser gets as a result of performance is personalty.[14] Though title to the trees pass to the purchaser, and a writing is necessary because they are conveyed as real property of the vendor, as soon as the purchaser gets title to them they become personalty though still attached to the land because they are owned by the purchaser, as things apart from the land solely for the purpose of removal.[15] Cases holding that such contracts may be specifically enforced are based on the extended period during which the contract is to run and the inadequacy of damages because of their speculative and uncertain character, rather than on the fact that a contract for the sale of land is involved.[16] But where a true interest in land is to be acquired by the purchaser under his contract, specific performance will be given though the interest may be slight, as a contract to make or assign leasehold estates,[17] easements and similar limited interests in land.[18]

A valid contract for the sale and purchase of land or an interest in land enforceable by specific performance gives to the purchaser an equitable estate of the nature of a trust, and the

is all he is entitled to, fail to apply the settled law that the purchaser gets an equitable estate which he may sell as he pleases, and are clearly erroneous. See § 87, *post*.

14 Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464 (1890).

15 What the vendor conveys is an interest in land, hence a writing under the Statute of Frauds is necessary; what the purchaser gets by the transfer of the trees is personal property, therefore a deed under seal is not necessary as a freehold estate is not transferred. See Slocum v. Seymour, 36 N. J. L. 138 (1873); Warren v. Leland, 2 Barb. (N. Y.) 613 (1848); Walsh, Property (2nd Ed.), 11, 12.

16 Buxton v. Lister, 3 Atk. 383, 26 Eng. Rep. 1020 (1746); Stuart v. Pennis, 91 Va. 688, 22 S. E. 509 (1895), [See *dicta* that the sale of trees was a sale of land; case decided, however, on inadequacy of damages because speculative]; St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (1903). See *post* § 61.

17 Crosbie v. Tooke, 1 Myl. & K. 431, 39 Eng. Rep. 745 (1833); Clark v. Clark, 49 Cal. 586 (1875); Gorder v. Pankonin, 83 Neb. 204, 119 N. W. 499 (1909); Shultz v. Hastings Lodge, 90 Neb. 454, 133 N. W. 846 (1911).

18 Coy v. Minneapolis &c. R. Co., 116 Iowa 558, 90 N. W. 344 (1902); Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356 (1886); Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970 (1910); (1911) 24 Harv. L. Rev. 410; (1915) 13 Mich. L. Rev. 401.

vendor holds the legal title as security for the payment of the purchase price. On the death of either his interest passes in accordance with this rule of equitable conversion to the heirs of the purchaser as realty, and to the personal representative of the vendor as personalty.[19] The rules governing the enforcement of the contract and the performance thereof in equity can be understood only as this radical change effected by the mere making of the contract is constantly kept in mind.

§ 60. **Contracts for the Sale of Chattels.** Where the subject-matter and terms of a sale are defined, title passes to the purchaser on the sale, in the absence of affirmative evidence establishing intent that title is not to pass until delivery or at some future time. In these cases there is no occasion for specific performance. The purchaser has his remedies at law for the recovery of his goods or their value, and the vendor has his action for the purchase price.[20] But where the goods are not in existence at the time the contract is made, or where no specific goods are referred to, so that a delivery of the commodity in the amount and of the quality specified, whatever its source, will satisfy the contract, or in any other case in which it appears affirmatively that title is not to pass until some future time, an executory contract to sell personalty is involved, and the question of remedy, viz., specific performance or damages, is raised in case of breach. The general rule is that specific performance of such contracts for the sale of chattels will not be given because the remedy of damages is adequate, in that the plaintiff may purchase similar chattels readily, and the recovery as damages of the amount they cost him over and above the contract price is a full and adequate remedy.[21] In the usual case, therefore, the vendor may elect to keep the goods and pay damages. A provi-

19 See *post*, Ch. XVII.

20 For an account of this development in the law of sales see Walsh, Hist. Eng. & Am. Law, 437, 438, quoting Fortescue, C. J., in Y. B. 20 Hen. VI, 35, 4: "If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of Debt for the money, and I shall have Detinue for the horse on this bargain."

21 For lists of cases holding that executory contracts for the sale of ordinary chattels and commodities readily purchasable in the market will not be specifically enforced in equity see 3 Williston, Contracts, 2520, n. 12; 36 Cyc. 554.

sion of the Uniform Sales Act,[22] now in force in many states, taken from the English Statute,[23] gives to the courts discretionary power to compel specific performance in these cases as against the vendor when for any reason specific relief would be superior to damages. The inherent superiority of specific relief, giving to the purchaser exactly what the contract calls for, over damages based on his seeking like goods elsewhere, with the attendant trouble involved and the uncertainty of being able actually to collect a judgment for damages, gives an extensive field for the broadening of specific performance in these cases in the exercise of this discretionary power.

On the other hand, where the vendor is plaintiff against a defaulting purchaser, the remedy at law which has developed in many states amounts in effect to specific performance, but without the *in personam* means of enforcement peculiar to equity. By this rule the vendor may elect to hold or store the goods for the purchaser and recover the full price, or to sell them and recover the difference between the amount received and the contract price, or to keep the goods and recover as damages the difference between the contract price and the market price at the date fixed for performance.[24] Under the Uniform Sales Act

22 N. Y. Pers. Prop. Law, § 149. Specific Performance. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just. . . . See discussion of the object of this provision, Williston, Sales (2nd Ed.), § 601. Prof. Williston emphasizes the fact that specific relief is given in all cases unless unworkable in Scotland and under the civil law on the continent of Europe.

23 This is § 52 of the English Sales of Goods Act.

24 Bagley v. Findlay, 82 Ill. 524 (1876), Clark, Cas. Eq. 320, n.; Williston, Sales, §§ 562–565; Williston, Contracts, § 1365; Wait, The Seller's Action for the Price (1918), 17 Mich. L. Rev. 283. Prof. Williston points out the origin of this rule [Contracts, § 1366], in cases holding that a contract for goods to be made to order did not come under the Statute of Frauds because it was a contract for work and labor, not a contract to sell. This strained construction made to avoid the Statute of Frauds, was later applied to such contracts to justify recovery of the price in full instead of damages, the price fixing

this right of the vendor to recover the price is limited to goods which may not be readily resold at a reasonable price.[25] The former rule gave the buyer specific performance at law far in excess of his right to specific performance in equity, and without any corresponding right in the buyer as against a defaulting vendor. The reasons for the statutory modification are purely technical. If the provision of the Uniform Sales Act quoted in note 22 above is given effect with a reasonable degree of liberality in favor of the buyer as plaintiff, we may reasonably except corresponding liberality in like cases in equity when the seller is plaintiff. With law and equity merged under the Code it is clear that the relief afforded buyer or seller as plaintiff should be substantially the same. In either case, where specific performance would be superior to damages, it should be given, and ample power to give it exists quite independent of the statute.

Where the chattel is unique, having a special quality or value to the purchaser so that it cannot be duplicated in the market, money damage will be inadequate exactly as in cases of land contracts, and specific performance will be given. This doctrine applies to heirlooms, works of art, antiques, title deeds and muniments of title,[26] also to commercial paper and other documentary

the value of the labor and materials. This reasoning has been generally discarded as erroneous. The later New York cases, followed in the majority of the other states, hold that the vendor in any case may recover the full price, holding or storing the goods for the vendee, not only where title has passed, but where it has not passed because of the vendee's default.

25 Glass & Co. v. Misroch, 239 N. Y. 475, 147 N. E. 71 (1925). In several states the New York rule was modified by limiting it to cases where the goods "cannot readily be resold for a reasonable price" [§ 63 (3) Uniform Sales Act]. The Uniform Sales Act, adopting this modification, changes the law in New York and the other states in which the Act has been adopted. See 3 Williston, Contracts 2437–2442. For cases rejecting this doctrine see Williston, *ibid.* 2442, note 66.

26 Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (1684), [ancient horn]; Duke of Somerset v. Cookson, 3 P. Wms. 390, 24 Eng. Rep. 1114 (1735), [ancient silver altar piece]; Jackson v. Butler, 2 Atk. 306, 26 Eng. Rep. 587 (1742); Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558 (1890) and Pattison v. Skillman, 34 N. J. Eq. 344 (1881), [title deeds and other papers relating to title]. See list of cases, 1 Ames, Cas. Eq. 40. Many of these cases were actions against converters of the chattels to compel specific return by mandatory injunction because damages at law would be inadequate. Replevin is

evidence of choses in action, as well as other writings having special or unique value for which money damages could not be adequate compensation, the question more usually arising in actions against wrongful holders of such documents for a mandatory injunction requiring their return to the plaintiff.[27] If the subject-matter of the contract is in part of the kind which makes specific performance the only adequate relief, while in part it is of the sort for which damages would be adequate, equity gives specific performance of the entire contract so that the entire controversy may be settled without another action at law, on the same principle on which damages up to the trial are awarded in connection with injunctions restraining continuous or repeated trespasses or nuisances.[28] No doubt if specific

not an adequate remedy at law in these cases because originally it would lie only in cases of wrongful distress, and later when it became concurrent with trover against the wrongdoer in possession the defendant could satisfy the judgment by paying the value of the goods as found by the judgment, just as in detinue against a bailee payment of the value of the goods satisfied the judgment. When, about the middle of the nineteenth century, the courts finally established the right of the plaintiff in replevin to recover his property in specie, no longer subject to the defendant's election to pay their value, the specific relief thus afforded was in substance defeated by the rebonding privilege given generally by statute to the defendant, by which he may repossess himself of the chattels and do with them as he pleases, pending final judgment, subject to the payment of their value under his bond. Security under the bond for payment of the judgment seems to be the only certain advantage of the modern action of replevin over trover and conversion. For details of the history of these actions see Walsh, History Eng. & Am. Law, 320, 321–328. As to the inadequacy of replevin under the modern law, see McGowin v. Remington, 12 Pa. 56 (1849). The same question of specific relief determines these cases as in cases of specific performance. If ordinary chattels or commodities easily duplicated are involved, damages at law would be adequate, and equity will not give specific relief.

[27] McGowin v. Remington, *supra* note 26; Pierce v. Lamson, 87 Mass. (5 Allen) 60 (1862). In Farnsworth v. Whiting, 104 Me. 488, 72 Atl. 314 (1908), in addition to granting a mandatory injunction requiring the turning over of stocks and bonds to the plaintiff, the court required the defendant to surrender possession of the key of a safe deposit box, as damages in the place of the key would be clearly inadequate.

[28] McGowin v. Remington, *supra* note 26, in which the court compelled the defendant tort feasor to turn over the furniture of an office in addition to maps and records of unique character, though money damages would be adequate relief

performance has become impossible or impracticable in part, partial specific performance will be given with damages.

§ 61. Specific Performance Where Damages Are Speculative or Conjectural. Where a valid contract exists which has been broken by the defendant, so that the plaintiff's right to recover damages is clear, specific relief will be given if practicable where the amount of the damages are so uncertain and speculative, for any reason, that the fixing of the amount thereof by the jury could not be guided by any definite standard, but would have to depend on their judgment and common sense, and might vary within broad limits without error for which their verdict could be set aside. There are many such situations in which at law all the plaintiff can get is a very rough estimate of his damages. In such cases specific performance is definitely superior because it gives the plaintiff exactly what he is entitled to. The inadequacy of damages in these cases is based upon the uncertainty and indefiniteness of the amount which the plaintiff might recover. There can be no recovery at law when there are no definite facts on which an inference of definite profits may be reasonably based, and where, therefore, there is only a speculative possibility of damages,[29] but where the fact of substantial

for such furniture. A contract for the sale of land and chattels is another illustration. See cases cited 2 Cook, Cas. Eq. 20, 21, n.; (1901) 15 Harv. L. Rev. 318.

[29] Lowrie v. Castle, 225 Mass. 37, 113 N. E. 206 (1916), and cases therein cited, the court saying, "such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty. . . . Pure chances lying between the alleged wrong and the anticipated profits, dependent upon unsettled conditions, render impracticable the assertion of cause and effect."

But see 3 Williston, Contracts, 2403. Professor Williston says that in most cases in which prospective damages are allowed the future profit was a chance, all reasonable expectancies being subject to defeat by the happening of contingent events. "But if the plaintiff has given valuable consideration for the promise of a performance which would have given him a chance to make a profit, the defendant should not be allowed to deprive him of that performance without compensation unless the difficulty of determining its value is extreme." He cites Chaplin v. Hicks, [1911] 2 K. B. 786, in which the plaintiff recovered substantial damages for failure to notify him to appear as one of fifty of whom twelve were to be selected by judges for certain awards, though his chance of an award was

damages is reasonably established, uncertainty in fixing the amount does not prevent recovery at law.[30] The law will do the best possible by awarding approximate damages rather than permit a breach of a valid contract to go without redress.[31] It is in just such cases of difficulty and uncertainty in fixing the damages that equity intervenes, and, by enforcing specific per-

one in four. He adopts the statement made in Emerson v. Pacific Coast &c. Packing Co., 96 Minn. 1, 8, 104 N. W. 573 (1905): "It is no exoneration to defendant that his misconduct, which has made inquiry as to the quantum of harm necessary, renders that inquiry difficult. The best the law can do is to award approximate compensation. Its failure to do even and exact justice in such cases is not more conspicuous than in many others." See Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291 (1887).

Where substantial damages are reasonably certain, uncertainty as to their amount does not bar recovery. See note following.

30 Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264 (1886); Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566 (1919); Wright v. Maynard Corset Co., 229 Mass. 343, 118 N. E. 654 (1918); U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81 (1884).

31 See *supra* notes 29 and 30. The law of torts has many illustrations of damages awarded by a jury without any certain and definite basis of determining the amount. In negligence cases verdicts for personal injuries are not disturbed on appeal though the jury's award is necessarily an approximation which may vary within quite extensive limits and still be regarded as reasonable on appeal. Assault and battery, false imprisonment, malicious prosecution, slander and libel, nuisances, injuries to business, in short the entire field of torts, supply many illustrations.

Assuming that the possible profits from the contract are so speculative that no recovery could be had at law, will equity enforce the contract? Surely it will if a substantial right under a valid contract is involved. The sole difficulty at law is the inadequacy of the relief which the law has to offer, viz., damages, failing because incapable of proof. The law does not hold in such cases that the contract is invalid. It simply fails in its attempt to give relief. This presents a very clear case for specific relief in equity. In Bay City Irrigation Co. v. Sweeney, 81 S. W. 545 (Tex. 1904), specific performance of a contract to supply water for irrigation was given because damages for the loss of the plaintiff's crop of rice, which he had planted, would be a matter of speculation making recovery at law uncertain. Prof. Durfee says [Cases on Eq., 233 n.], that it is doubtful whether any recovery could be had at law in this case of the value of a crop that might have been raised if the water had been supplied, quoting from Lowrie v. Castle, *supra* note 29. See cases of breach of contracts to supply water power in which recovery of damages at law was allowed, cited, 3 Williston, Contracts, 2404, n. 35, 36.

formance, gives to the plaintiff exactly what his contract calls for. Thus where performance is to extend over a term of years, and damages based upon the cost of the commodity during the term of the contract may be much greater than if based on the market value at the time of the defendant's anticipatory breach, and the extent of such damage is a matter of uncertainty and conjecture, specific performance will be decreed. Contracts for the sale of growing trees, referred to above,[32] where the purchaser is given several years to cut and remove them, are illustrations. A contract for all the coal tar produced at the defendant's works was enforced specifically in a Maryland case principally for this reason and partly because the plaintiff would be put to serious additional trouble and expense in obtaining the coal tar elsewhere, as it could be secured only from the defendant in Baltimore where the plaintiff needed it, giving it a special intrinsic value not readily measurable in money damages.[33] Other illustrations appear in the notes.[34]

In several cases the inadequacy of damages as compared with specific performance arose out of a special need of the plaintiff

[32] *Supra* note 16.

[33] Equitable Gas Light Co. v. Baltimore Coal Tar &c. Co., 63 Md. 285 (1885).

[34] Peale v. Marian Coal Co., 190 Fed. 376 (1911). Here the court decreed specific performance of a contract to deliver to the plaintiff or his assigns the entire output of a culm bank and washery until its exhaustion, including materials thereafter deposited thereon by the D. L. & W. R. Co. This was based on the uncertainty of the amount of coal which would be taken and the length of time required, in the performance of the contract. The court added: "It is evident, furthermore, that in order to recover damages by remedy at law it would be necessary to resort to a multiplicity of suits. The plaintiff might bring suit monthly to recover damages for loss of profits for the preceding month, or he might resort to annual suits. He could not recover in any one suit for all of the damages, because it would be impossible to ascertain or to show what the damages would amount to in any one suit, for reasons which are clearly obvious." This decree for specific performance was reversed, 204 Fed. 161 (1913), because the contract provided for remedies not referred to above which the appellate court regarded as better than specific performance. The quotation above suggests the question, Will equity grant specific performance to take the place of repeated actions for damages as they accrue where prospective damages cannot be ascertained? This seems to be merely a variation of the question always involved in these cases, Is the remedy at law adequate?

for the defendant's goods, and the difficulty of securing a substitute, giving the goods a special and unique quality for the purposes of the contract. In a leading New Jersey case the court specifically enforced a contract to sell to the plaintiff the entire crop of tomatoes planted on the defendant's land because the short canning season required contracts for the necessary supply for the plaintiff's canning factory, and damages would be inadequate because of the difficulty or even impossibility of securing other tomatoes in the amount and quality needed.[35]

Contracts for the sale of corporate stock will be specifically enforced if the market value is uncertain.[36] If the stock has a

35 Curtice Bros. Co. v. Catts, 72 N. J. Eq. 831, 66 Atl. 935 (1907), Durfee, Cas. Eq. 234. The strong tendency to extend specific relief to contracts for the sale of chattels where for any substantial reason such relief is superior to damages is well illustrated by the opinion in this case. To same effect: Equitable Gas Light Co. v. Baltimore Coal Tar Co., *supra* note 33; Gloucester Isinglass Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005 (1891); Kann v. Wausau Abrasives Co., 81 N. H. 535, 129 Atl. 374 (1925). See White Marble Lime Co. v. Consol. Lumber Co., 205 Mich. 634, 172 N. W. 603 (1919); Strause v. Berger, 220 Pa. 367, 69 Atl. 818 (1908). A contract to sell patented articles not obtainable except from defendant, and required by the plaintiff, is another illustration. Adams v. Messenger, 147 Mass. 185, 17 N. E. 491 (1888); so also a contract for stone used in a partly completed building not obtainable elsewhere. Rector of St. David v. Wood, 24 Ore. 396, 34 Pac. 18 (1893).

36 Waddle v. Cabana, 220 N. Y. 18, 114 N. E. 1054 (1917), [Pound, J., saying: "The value of the stock in suit can be ascertained only in the most speculative way. A contract for the purchase of stock freely sold in the market would not be thus enforced, for an adequate remedy at law exists in such cases, but to deny this remedy when the stock has no ascertainable value, is nearly all owned by one man and can be obtained only from him. . . . would be to deny to appellant the substantial benefit of the contract. Butler v. Wright, 186 N. Y. 259; Adams v. Messinger, 147 Mass. 185, 188; Northern Cent. Ry. Co. v. Walworth, 193 Pa. 207"]; Johnson v. Brooks, 93 N. Y. 337 (1883), [specific enforcement expressly on this ground, though the case involves a fiduciary relation from which a trust would be implied. See Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. Supp. 766 (1905), aff'd without opinion, 187 N. Y. 521 (1907), [in which considerable evidence of value of stock existed]; Frue v. Houghton, 6 Colo. 318 (1882); Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1085 (1895); First Nat. B. v. Corp. Securities Co., 128 Minn. 341, 150 N. W. 1084 (1915); Avery v. Ryan, 74 Wis. 591 (1889).

definite market value based on sales on an exchange or otherwise, damages is the only remedy,[37] unless it appear that the stock purchased was bought for control of the corporation, giving it a special value apart from its market value not measured by money damages.[38]

Contracts to sell bonds and mortgages, notes and other choses in action will be specifically enforced because of the uncertainty of the amount of damages, the value of such securities turning on the financial standing of those obligated on the bond or other security. Whether buyer or seller is plaintiff, he is entitled to the specific thing or price which the contract calls for, rather than a jury's estimate of his damages based on the uncertain and indefinite valuation of the securities involved.[39]

A contract to pay an annuity will be enforced by specific performance for the same reason, viz., damages is an inadequate

[37] See cases in preceding note. In Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626 (1887), 2 Cook, Cas. Eq. 39, the stock involved had no regular market or established value. The court refused specific performance for the reason that the plaintiff agreed to take the stock as a substitute for cash for the boat which he was selling for the stock, and as the value of the stock had been definitely found to be $3600, his remedy at law was adequate. But the boat was worth more, so he was left with the boat and an action for nominal damages. Contracts for the sale of boats are generally enforced specifically in actions by the purchasers. Hart v. Herwig, L. R. 8 Ch. App. 860 (1873); Menier v. Donald, 98 Misc. 684, 165 N. Y. Supp. 50 (1917), 3 Williston, Contracts, 2520, n. 15, 2 Cook, Cas. Eq. 21, n. See *post* § 68, as to right of the vendor to specific performance in such cases. See Hills v. McMunn, 232 Ill. 488, 83 N. E. 963 (1908), [specific performance enforced as the stock had no market value].

[38] Rumsey v. N. Y. & Pa. R. Co., 203 Pa. 579, 53 Atl. 495 (1902); Nason v. Barrett, 140 Minn. 366, 168 N. W. 581 (1918), 3 Williston, Contracts, 2522.

[39] Gottschalk v. Stein, 69 Md. 51, 13 Atl. 625 (1888), 2 Cook, Cas. Eq. 44, Clark, Cas. Eq. 337; Scarborough v. Scotten, 69 Md. 137, 14 Atl. 704 (1888), [action to compel defendant to turn over possession of promissory notes and bills sustained on demurrer, as remedy at law in trover would be inadequate. "He (plaintiff) ought to have his notes and be allowed to bide his time for the collection thereof as he might find practicable . . . and it is inequitable to force him in effect to sell them for what an action of trover would give him for them."]; Wright v. Bell, 5 Price, 325, 146 Eng. Rep. 622 (1818) and Adderley v. Dixon, 1 Sim. & Stu. 607, 57 Eng. Rep. 239 (1824), cited in Gottschalk v. Stein, *supra;* Cutting v. Dana, 25 N. J. Eq. 265 (1874).

substitute. The plaintiff should not be compelled to accept as damages the present value of the annuity in a lump sum instead of the annuity itself in periodic payments according to the contract.[40] Contracts for the assignment of patents come under the same principle and are enforced by equity because a lump sum as damages may be much less than the profits which the plaintiff might realize from the invention, and such damages would necessarily be speculative and hard to arrive at, as the invention would be unique with no opportunity for duplication.[41]

§ 62. Contracts to Give Security, to Exonerate and to Insure. Damages constitute no remedy of any value for breach of a contract to give security for an existing debt as the plaintiff can get a judgment at law for the debt to be secured whether security be given or not. He is entitled to the specific thing, the security which his contract calls for, and therefore specific relief in equity is the only possible relief.[42] It is be-

[40] Fleming v. Peterson, 167 Ill. 465, 47 N. E. 755 (1897), 2 Cook, Cas. Eq. 33, the court saying: "She [plaintiff] ought not to be compelled, at the election of the party in default, to accept something in satisfaction so different in its nature, and possibly in value as well, simply because the law, in its unbending forms of procedure, affords her no other remedy." See also Withy v. Cottle, 1 Sim. & Stu. 174, 57 Eng. Rep. 70 (1823).

[41] Cogent v. Gibson, 33 Beav. 557, 55 Eng. Rep. 485 (1864); 1 Ames, Cas. Eq. 56; Pressed Steel Car Co. v. Hansen, 128 Fed. 444 (1904), 137 Fed. 403 (1905); Hodges v. Kowing, 58 Conn. 12 (1889); Conley v. Finn, 171 Mass. 70, 50 N. E. 460 (1898); Hatt v. Rich, 59 N. J. Eq. 492, 45 Atl. 969 (1900). See list of cases, Ames, *op. cit.* 56 n.; 3 Williston, Contracts, 2521, n. 17.

[42] In Dean v. Anderson, 34 N. J. Eq. 496 (1881), in specifically enforcing a contract to give a mortgage on land, Chancellor Bloomfield said: "A party requires security by mortgage because he is unwilling to trust to the personal responsibility of the person with whom he agrees, and to refuse him a remedy against the estate agreed to be mortgaged is to deprive him of the principal security on which he relied." In Bosch Magneto Co. v. Rushmore, 85 N. J. Eq. 93, 95 Atl. 614 (1915), a contract to give a Surety Company bond of $100,000 to protect the plaintiff from liability for infringement of a patent in threatened suits was specifically enforced against the defendant, because plaintiff was entitled to the specific security. The court quoted Pitney, V. C., in Feigenspan v. Nizolek, 71 N. J. Eq. 382, 65 Atl. 703 (1907), as follows: "The policy of the law is that business men should keep their contracts, and not turn the contractee over to the uncertain remedy of an action at law for damages for nonperformance. It is in my judg-

cause of the loss of this security that equity enjoins acts of waste by the mortgagor that will result in a material weakening of the mortgagee's security.[43] The doctrine of equitable mortgages turns entirely on this principle, and goes far beyond the mere specific enforcement of express contracts to give security. Not only will such contracts be enforced in actions for specific performance, but in every such case an equitable mortgage exists as a right *in rem* from the time money or value is parted with by the plaintiff on the faith of defendant's promise to give security, good against all persons except a purchaser for value without notice.[44] Even though no agreement exists to execute a formal mortgage or other security, the parting with money or value by the plaintiff relying on the defendant's agreement that certain specified property, real or personal, shall be security for

ment, one of the most important functions of courts of equity to prevent injuries which result in damages in all instances where it is practicable to do so, and the tendency is toward extending the protecting power of the court to cases not formerly thought to be sufficient to invoke its action."

"Specific performance of agreements prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Chief Justice Fuller, in Union Pac. R. Co. v. Chicago & C. R. Co., 163 U. S. 564, 16 Sup. Ct. 1172 (1896), quoted in Bosch Magneto Co. v. Rushmore, *supra*.

Contracts for mortgages or liens on chattels were enforced as equitable mortgages in Rothholz v. Schwartz, 46 N. J. Eq. 477, 19 Atl. 312 (1890) and Thiebert v. Burgess, 11 Md. 452 (1873). Compare City Fire Ins. Co. v. Olmsted, 33 Conn. 476 (1866), refusing to enforce such a lien against the insolvent estate of the deceased promisor. "The creditors stand upon the same footing, and equality is equity." Leading cases are Herman v. Hodges, L. R. 16 Eq. 18 (1873); Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888), Dean v. Anderson, 34 N. J. Eq. 496 (1881), Chase v. Peck, 21 N. Y. 581 (1860); Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 (1894); Morris v. McCutcheon, 213 Pa. 349, 62 Atl. 982 (1906). See 1 Ames, Cas. Eq. 61, n. 3.

43 See *ante* § 27.

44 Cases *supra* note 42, also Stoddard v. Hart, 23 N. Y. 556 (1861); Burdick v. Jackson, 2 Hun 488 (N. Y. 1876); Bogart v. Bliss, 148 N. Y. 194, 42 N. E. 582 (1896); Sleeth v. Sampson, 237 N. Y. 69, 142 N. E. 355 (1925). See discussion of Sleeth v. Sampson in Ch. V, *ante* note 94. See as to partial performance under the Statute of Frauds, § 84, *post*. See corresponding cases of equitable mortgages where a deed is given as security, Ch. V, *ante* note 95. That this equity is cut off by a conveyance to a purchaser for value without notice see Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163 (1900).

repayment of the loan or other debt, results in an equitable mortgage on such property to secure the debt, reason and justice demanding that the plaintiff shall have the security for the debt, relying on which he made the loan or gave the credit to the defendant.[45]

A mere executory contract to make a loan to be secured by mortgage or otherwise will not be specifically enforced. Damages for breach is an adequate remedy to either party.[46] There is no loss of security because no debt has arisen to be secured. But if money has been advanced or credit given or extended, relying on a promise to give security, the security exists in equity, not only where a promise to give security by way of executing a mortgage or other formal security may be specifically enforced, but quite independent thereof if money was advanced or credit given on the strength of an agreement that certain property should be regarded as security for the advance. It is evident, therefore, that specific performance is not the basis of

[45] The English doctrine that the deposit of title deeds to land as security for a loan or credit made on the faith thereof creates an equitable mortgage, discussed and approved in Chase v. Peck, *supra* note 42, is the foundation, historically, of this doctrine. Implying an agreement to execute a formal mortgage in such cases is simply contrary to the fact. See Sporle v. Whayman, 20 Beav. 607, 52 Eng. Rep. 738 (1855), where the court compelled the execution of a memorandum of such deposit, but not a formal mortgage. In Chase v. Peck, 21 N. Y. 581 (1860), there was no pretense of an agreement to execute a mortgage; the informal agreement that the land should be security for the carrying out of his agreement created the equitable mortgage. Specific performance is an incident of rather than a reason for equitable mortgages. If the contract is executory on both sides it will not be enforced in equity. See *post* note 46. The plaintiff's equity arises out of making a loan or otherwise parting with value on credit relying on the agreement that the land or chattels should be security therefor, not on a right to enforce a contract to execute a formal mortgage. The notion that the right to specific performance is an essential of an equitable mortgage, contrary to Chase v. Peck, *supra*, led to an erroneous decision in Stoddard v. Hart, 23 N. Y. 556 (1861), *supra* note 44. The danger of confusing equitable mortgages with specific performance is again illustrated in Sleeth v. Sampson, *supra*, note 44.

[46] Rogers v. Challis, 27 Beav. 175, 54 Eng. Rep. 68 (1859), 1 Ames, Cas. Eq. 61; Conklin v. Peoples' Bldg. & Loan Ass'n, 41 N. J. Eq. 20, 2 Atl. 615 (1886); Bradford &c. R. Co. v. N. Y. L. E. & W. R. Co., 123 N. Y. 316, 25 N. E. 499 (1890).

equitable mortgages, though specific performance in cases where a contract to make a mortgage exists is an important instance of equitable relief where relief at law is inadequate.[47]

Contracts to exonerate the plaintiff from the payment of debts or demands assumed by the defendant are enforced for a like reason expressed in a different form. Just as the creditor may recover his debt in the form of a judgment for the amount due irrespective of the security, and therefore damages for breach of the contract to give security is no remedy at all, so also damages as a remedy is worthless to the beneficiary of a contract of exoneration. The sole purpose of the promise to exonerate is to relieve the plaintiff from the burden of raising the money to meet the debt or claim. If he is forced to pay it he will have his action therefor with interest against the defendant who took over his business and assumed the debt, whether or not a contract to exonerate had been made. The specific thing, the compelling of the defendant to pay the debt when it accrues, is the only relief possible. Damages would give nothing of value to the plaintiff.[48]

Contracts to insure by issuing a policy have been enforced whenever the execution and delivery of a formal policy of insurance is necessary or advantageous to the securing of full relief by the insured. In case of loss prior to the action the policy is enforced as though issued before the loss, without requiring a

47 See *supra* notes 42–45.

48 Comes Ranelaugh v. Hayes, 1 Vern. 189, 23 Eng. Rep. 405 (1683); Champion v. Brown, 6 Johns. Ch. 398 (N. Y. 1822); 1 Ames, Cas. Eq. 64. A surety may maintain a bill for exoneration against the debtor and compel him to pay the debt, and against a co-surety to compel him to pay his share. See cases cited Ames, Cas. Suretyship, 597 n. 2, 598 n. 2. Contracts to exonerate property of the plaintiff by paying off a mortgage or other lien will be enforced in equity for like reasons. Reilley v. Roberts, 34 N. J. Eq. 299 (1881), [defendant required to satisfy judgment liens pursuant to a contract of exchange of lands]. See additional cases cited Ames, *op. cit.*, 64 n. 1.

In Pierce v. Plumb, 74 Ill. 327 (1874), 2 Cook, Cas. Eq. 41, a contract to exonerate was construed as giving an action against the promisor for the full amount on his default, before payment of the debts to the creditor. See discussion of this case (1918), 1 Ill. L. Bull. 119. The remedy at law was held to be adequate. The prevailing rule is that the plaintiff must pay the debts before he can recover on the contract to exonerate, hence the granting of equitable relief.

separate action at law on the policy.[49] The need of relief in equity in these cases has been removed for the most part by the development of the rule at law that "binders" and similar preliminary contracts will be enforced and the loss recovered by the insured exactly as though the policy had been issued.[50]

§ 63. Equitable Relief Because of Insolvency of Defendant. In a considerable number of the cases in which equity has intervened to restrain torts, discussed in preceding chapters,[51] the insolvency of the defendant is stated to be one of the reasons for equitable action. In nearly all, if not all, of these cases, this seems to have been a make-weight argument, a fact appealing to the court's discretion, but where other reasons existed amply justifying equitable relief.[52] Surely it has never been seriously contended that equity will restrain a wrongdoer from a threatened wrong merely because the defendant could not satisfy a judgment that might be recovered against him. Such a doctrine would at once throw into equity practically the entire field of tortious liability, as inadequacy of damages could be readily established in probably a majority of tort cases by alleging and proving the irresponsibility of the defendant.

In the field of contract a more serious effort has been made to establish the right to equitable relief in the form of specific performance because of inadequacy of damages by setting up and proving the defendant's insolvency.[53] Certainly the mere fact

49 Taylor v. Merchant's Fire Ins. Co., 50 U. S. [9 How.] 390 (1850); Ellis v. Albany Co., 50 N. Y. 402 (1872); Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96 (1854), [life insurance].

50 Van Tassel v. Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 364 (1896); 161 N. Y. 413 (1900); 184 N. Y. 607 (1906); Hicks v. Brit.-Am. Assur. Co., 162 N. Y. 284, 56 N. E. 743 (1900), Baile v. St. Joseph's Ins. Co., 73 Mo. 371 (1881). See Richards, Insurance, 94–98, and cases cited, showing details of actual closing of preliminary contract by binder. "The act and time of delivery of the policy itself are of comparatively trifling significance." *Ibid.*, 96. The fact that "specific performance" does not appear in Richard's index, and that the cases cited by Prof. Ames (Cas. Eq. 60), are all very old, tends to show the present situation in these cases.

51 See Chapters VI, VII, IX, *ante.*

52 See preceding note.

53 Clark v. Flint, 5 Mass. (22 Pick.) 231 (1839), the court saying, *dicta:* "If the party injured by a breach of a contract can not avail himself of his remedy at law for any beneficial purpose [because of the insolvency of the defendant],

that the defendant is insolvent or execution proof is not by itself sufficient. Such a doctrine would turn over to equity all actions at law for damages where this financial condition of the defendant could be established, whether in tort or in contract, and none of the cases establish any such doctrine.[54] It may be argued with some reason that the defendant could not object fairly to specific performance, which requires him to perform his obligation, and where the rights of other creditors are not interfered with there would be no one else to object.[55] But this argument hits the entire system of damages at law in its weakest point, and if accepted, would go a long way to substitute specific relief for damages as normal relief generally, like relief under the civil law on the continent of Europe, and would be in the nature of a revolutionary change, probably desirable, but very far from being accepted by the courts. We cannot start, therefore, with the assumption that specific performance will be given where a judgment for damages will be uncollectable

or if it be doubtful whether he can or not, a court of equity, if it can relieve him, ought certainly to interpose, and compel the other party to perform his contract." The defendants were compelled to transfer their interest in the vessel because they took title with notice from one who held title as trustee for the plaintiff. See list of cases cited, 3 Williston, Contracts, 2526, n. 38, and cases in notes following.

54 Nearly all the cases asserting insolvency as a basis for specific performance state that standing alone it gives no ground for equitable relief. In Livesley v. Johnston, 45 Ore. 30, 76 Pac. 13, 946 (1904), in giving specific performance of a contract to grow and deliver crops of hops for five years, the court said: ". . . the insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance in this class of cases. There must be some other element or principle of equitable cognizance upon which the remedy is invoked: Gillet v. Warren, 10 N. M. 523; McLaughlin v. Piatti, 27 Cal. 451; Cincinnati &c. R. Co. v. Washburn, 25 Ind. 259. The fact of insolvency, when combined with other causes for equitable interposition, may, however, become a potent or even controlling factor in determining the fact of jurisdiction."

To the same effect, Heilman v. Union Canal Co., 37 Pa. 100, 104 (1860), the court saying: "It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy." See, also Ridenbaugh v. Thayer, 10 Idaho 662, 671, 80 Pac. 229 (1905) and list of cases, 3 Williston, Contracts, 2526, n. 39.

55 Clark, Equity, 51, 52.

in cases where the rights of other creditors under the bankruptcy laws would not be affected adversely. The cases holding or stating that insolvency is a reason for specific performance were based on other facts making damages inadequate, of the various kinds discussed in the foregoing sections, and insolvency was, therefore, a make-weight reason, of real importance in close cases in determining the exercise of the court's discretion to grant or withhold specific relief, but of no importance in other cases in which such relief would be given irrespective of the defendant's insolvency. Most of these cases assert that insolvency alone is not enough to justify specific performance.[56] The remaining question of importance is, therefore, whether insolvency should be allowed as a make-weight reason to sway the court in close cases where specific performance would work a preference as against other creditors contrary to the objects of the bankruptcy laws. The Bankruptcy Act forbids a preference of one creditor over another by an insolvent person, making any such preference an act of bankruptcy, and providing that any such preference will be set aside if made within four months prior to the bankruptcy, irrespective of the intent of the debtor. This does not prevent sales by the insolvent debtor prior to bank-

56 See cases *supra* note 54. In McLaughlin v. Piatti, 27 Cal. 452 (1865), in denying specific performance of a contract for the sale of cattle based on the defendant's insolvency the court declared that the jurisdiction of equity is in no way based on "the accident of insolvency." In Emerzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072 (1913), the court expressed the prevailing principle more accurately in asserting that insolvency alone is immaterial, but when coupled with other circumstances, "in balancing cases, it is a consideration that gives preponderance to the remedy." In Dills v. Doebler, *supra* note 8, the court held that insolvency of the defendant was not a ground for specific performance. "It is the contract itself which gives or takes away from the court its jurisdiction, not the wealth or poverty of the party defendant." In United N. J. R. Co. v. Hoppock, 28 N. J. Eq. 261 (1877), the fact that defendant was execution proof did not give equity jurisdiction. Union Co-operative Co. v. Adolfson, 103 Neb. 394, 171 N. W. 902 (1919), Durfee, Cas. Eq. 250, sums up the matter as follows: "A majority of the adjudicated cases seems to hold that insolvency, of itself, is not an independent ground for the relief here prayed. Where a contrary doctrine is asserted, other equitable circumstances have usually been present. Southern Iron & Equipment Co. v. Vaughan, [201 Ala. 356, 78 So. 212], L. R. A. 1918 E. 594, 611 & note; 36 Cyc. 564."

ruptcy if made in good faith for a reasonable return, and therefore, if adequate reasons exist for specific performance, the Bankruptcy Act is in no sense a bar.[57] An equitable right *in rem* in a purchaser of land from the insolvent prior to his bankruptcy, or a similar right arising as an equitable mortgage on his real or personal property, will be protected as against the creditors after the bankruptcy where no preference has taken place,[58] but where the insolvent has contracted to sell chattels which the purchaser has paid for before delivery, to give the goods to the purchaser ahead of the creditors would be a preference in clear violation of the Bankruptcy Act, because a delivery of such goods within four months prior to the bankruptcy, payment having been made some time in advance, would be a preference void under the Act.[59]

It seems clear, therefore, that insolvency alone is not a reason for specific performance, but where other independent reasons for specific relief exist, insolvency may throw the balance in favor of equitable relief when without it the court, in the exercise of its discretion, might have decided against specific performance. But insolvency should not be permitted to sway the court's discretion when the result would be a preference, contrary to the law of bankruptcy.

57 3 Williston, Contracts, 2526–2529, and cases cited, covering the relation of bankruptcy to specific performance. Prof. Durfee (Cas. Eq. 254 n.) refers to two cases in which the court gives as an additional reason why specific performance should not be allowed, that it would cause a preference. In these cases commodities of the usual kind were to be delivered at a stated price. Block v. Shaw, 78 Ark. 511, 95 S. W. 806 (1906); Warren Co. v. Black Coal Co., 85 W. Va. 684, 102 S. E. 672 (1920). Since delivery involved payment of the price, and the transactions were in good faith, no preference was involved in either case. However, no grounds for specific performance existed apart from insolvency.

58 Burdick v. Jackson, 7 Hun. 488 (N. Y. 1876); In re Snelling, 202 Fed. 259 (1912).

59 3 Williston, Contracts, 2527, 2528, and cases cited.

CHAPTER XIII

SPECIFIC PERFORMANCE; WHEN DENIED BECAUSE IMPRACTICABLE

§ 64. **Contracts to Arbitrate.** Much of the hesitation of courts of equity to grant specific performance has been due to the feeling that the court should not attempt more than it can be certain of accomplishing. With jealous and competing courts of law questioning the power of equity to interfere in the protection of legal rights, it was natural that the Chancellor should be very certain that his decrees would be effective, and that Chancery should not be weakened by the loss of prestige which would follow from decrees that could not be enforced.[1] This explains the excessive conservatism of courts of equity in refusing to give specific performance of contracts involving extensive detail and a considerable period of time in their performance. The courts felt that they could not, as a practical matter, give the necessary time and supervision to the performance of the contract, and therefore their decrees would be ineffective in such cases. The extensive development of specific performance under the modern cases has come about by casting aside the notion that personal supervision by the court or its representative is necessary, and by recognizing the fact that the

[1] Pound, Progress of the Law (1920), 33 Harv. L. Rev. 434;—"When the chancellor was struggling to establish his jurisdiction with jealous courts of law eyeing him narrowly, the dignity of the court had to be maintained and it was jeopardized by any order which the chancellor could not be sure of enforcing. . . . Thus the notion arose that if a court of equity ordered a thing done it was bound to stand over every item and see it done according to the decree." Dean Pound explains how this resulted in a prejudice against enforcement of construction contracts and contracts calling for continuous performance over an extended period, because of the supposed necessity of supervision which would be impossible in such cases, and also a prejudice against enforcing affirmative contracts calling for more than a single act, and the favoring of negative promises enforceable by injunction.

defendant may be held for results as provided in the decree, leaving to the plaintiff the matter of bringing any failure of performance on the defendant's part to the attention of the court.[2] The inability of the court to compel the defendant to appoint an arbitrator or arbitrators, or to compel such arbitrators to act if appointed, led the courts to refuse specific performance of arbitration contracts.[3] At law contracts to arbitrate were sharply questioned because they substituted another tribunal for the court in the determination of controversies, and they were sustained as valid only by the holding that they did not interfere with the right of either party to pursue his remedy in the courts. If either party started such an action he could push it through to final judgment and satisfaction, though in violation of his contract to arbitrate. The other party had no remedy other than an action for breach of the contract, which is normally worthless as he could prove no damages.[4] The delay, uncertainty and expense involved in litigation at law with trial by jury, particularly in building and commercial transactions, have led to an extensive use of arbitration agreements in order that these evils might be avoided. The substantial rights of the parties under such contracts are obvious, as is the inadequacy of the remedy at law.[5] Though the equity court might not succeed in making the defaulting defendant appoint an arbitrator, or make such arbitrator act if appointed, there never was any valid reason why the court, acting for the defendant, should not have appointed an arbitrator or arbitrators who would act, restraining the defendant from proceeding at law. The power to do so cannot be doubted, and the justice and expediency of such action as against a defendant who has wilfully

2 See § 65, *post*.

3 Milnes v. Gery, 14 Ves. 400, 33 Eng. Rep. 574 (1807); Agar v. Maclew, 2 Sim. & Stu. 418, 57 Eng. Rep. 405 (1825); Pearl v. Harris, 121 Mass. 390 (1876); Greason v. Keteltas, 17 N. Y. 491 (1858); Hopkins v. Gilman, 22 Wis. 476 (1868). See cases cited, 36 Cyc. 577; 3 Williston, Contracts, 2529, n. 48, especially Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115 (1897); Davila v. United Fruit Co., 88 N. J. Eq. 602, 103 Atl. 519 (1918), [See N. J. Statute, *post* note 10]; Schneider v. Reed, 123 Wis. 488, 101 N. W. 682 (1904).

4 See Doleman & Sons v. Osset Corp., [1912] 3 K. B. 257; 3 Williston, Contracts, §§ 1719, 1927; 47 L. R. A. 337, 364, note.

5 Sturges, Commercial Arbitration or Court Application of Common Law Rules of Marketing (1925), 34 Yale L. J. 480.

refused to make the appointment in violation of his contract, is equally clear. Nevertheless the courts have continued to refuse specific performance in these cases by appointing an arbitrator for the defendant because they regard such action as not in accord with the contract, which they treat as demanding arbitrators selected by the parties in exact compliance with the contract. That such action would be substantial performance, the departure from the strict letter of the contract being due to the wrongful refusal of the defendant to act, ought to be beyond the limits of reasonable argument.

Many of the later cases have found a way to give specific relief by distinguishing between cases where the method of arbitration as provided in the contract is of its essence, and cases where such method is not essential but merely a means provided for reaching a reasonable and fair valuation or other settlement of the question to be determined by the arbitrators, the essence of the contract being that it be carried out as made, based on the reasonable value of the property or interest involved. In fact no real difference exists between the earlier and later cases except in the result, the suggested distinction being a fiction by which mistaken law is overcome in order that justice may be done. In Hopkins v. Gilman,[6] a lease of a city lot contained a provision that at the end of the term of five years the lessor had an option to have the value of any improvements made by the lessee appraised by three appraisers, one chosen by each party, and the third by the two so chosen, and to pay the lessee the value thereof, or to have the land without such improvements appraised in like manner and to renew the lease for another five years at a rental of 8% upon said valuation. The court reversed the judgment for specific performance, applying the general rule, though the lessor had refused either to pay for the improvements or to renew. The appellate court retained the action, however, sending the case back for the awarding to the plaintiff of compensation for the improvements according to their reasonable value, directing that he retain possession, as against defendant's action to oust him, until he was paid. In effect this amounted to an enforcement of the contract to arbi-

6 *Supra* note 3. See other cases to same effect cited in note 3.

trate the value of the improvements by substituting the value as found by the court, and though given as a substitute for damages at law, equitable relief was undoubtedly given by restraining the defendant from taking possession prior to payment of the amount so found. It would seem that as the defendant was in wilful default, and had failed to give the notice required as a condition precedent to the exercise of his option to pay for the improvements, the court might have much more justly compelled the execution of a new lease on a rental of 8% of the valuation of the land to be found by the court. If the court could enforce one term of the option based on the court's substituted valuation, it could have enforced the alternative provision to which the plaintiff was clearly entitled.

In Coles v. Peck,[7] a similar ground lease was involved with a like option in the landlord to continue the lease, or in the alternative to purchase the improvements or to sell the land, at a valuation to be fixed by appraisers to be chosen in the usual way. The court said that the doctrine of the cases above referred to "is mainly applied only to contracts for reference in which, by the form and language of the stipulation, the mode of determining the price by values, on arbitration, is made an essential provision—in fact condition—to the validity of the agreement, and to cases in which the parties can be easily placed in *statu quo,* or where an action for damages can be made to afford an adequate remedy." The court then quoted Pomeroy[8] that where the method of fixing the value of the property is not an essential part of the contract, equity will determine its reasonable value through a master or other officer or through an expert appraiser, or by determining the amount itself. Other cases are to the same effect. There is no real difference between the two classes of cases. In all of them it is evident that the reward is to be based on the reasonable value of the property at the time. No other test can be suggested by which the valuation is to be determined. The defendant deliberately breaks his contract by refusing to appoint an arbitrator. Equity now gives the plaintiff specific performance by in some way determining the reasonable

7 96 Ind. 333 (1884).

8 Specific Performance of Contracts, §§ 148–152.

value of the property under the guise of holding that the method of valuation is not of the essence.[9]

Statutes in several jurisdictions now provide for the specific performance of all contracts to arbitrate; if either party fail or refuse to appoint an arbitrator or if for any reason there be a failure to appoint an arbitrator or in filling a vacancy, the court shall make the appointment, and the person so appointed shall act with the same force and effect as though specifically named in the contract. In the meantime the defendant is to be enjoined from maintaining any suit on the issue which is to be arbitrated under the contract.[10] In England the statute in-

[9] Castle Creek Water Co. v. Aspen, 146 Fed. 8 (1906), the court saying: "The answer to this contention (that substituting a master or the court for the parties' appraisers is to make a new contract for them), however, is that it is not the court but the defaulter himself who by his own refusal to perform his contract deprives himself of the benefit of the appraisers to be chosen by the parties, that it does not lie in his mouth to say that the court may not select the valuers as long as he wrongfully refuses to do so, and that he is estopped from taking advantage of his own wrong to prevent the complainant from successfully invoking the aid of a court of equity to compel him to perform his agreement." (Citing among other cases Cherryvale Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176, 180; Bristol v. Bristol & Warren Water Works, 19 R. I. 413, 34 Atl. 359, 361; Herman v. Babcock, 103 Ind. 461, 3 N. E. 142; Black v. Rogers, 75 Mo. 441, 449; Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 487, 16 N. E. 420, for the doctrine that the court will determine the value where the method of determining it is incidental and not of the essence.) See, also, Mutual Life Ins. Co. v. Stephens, 214 N. Y. 488, 495, 108 N. E. 856 (1915); Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129 (1904); 36 Cyc. 578.

[10] N. Y. Arbitration Law, Laws of N. Y., 1920, c. 275, § 3 provides for enforcement by the aggrieved party petitioning the court on eight days notice to the defendant, served like a summons, for an order directing that the arbitration provided for in the contract be carried out. If the making of the contract to arbitrate is denied, that question shall be tried summarily, by a jury if either party demand a jury, otherwise by the court. § 4 provides for the appointment by the court of an arbitrator or arbitrators or an umpire, in case the defendant fails to do so, or for any reason a vacancy exists, as stated in the text, "and unless otherwise provided, the arbitration shall be by a single arbitrator." § 5 provides for a stay of proceedings brought in violation of the contract to arbitrate.

The Federal Arbitration Act, 43 Stat. 883 (1925), follows substantially the same lines, providing for the specific enforcement of contracts to arbitrate in maritime transac-

directly compels specific performance by providing for a stay of proceedings at law, forcing the party refusing to arbitrate to forego relief altogether or to submit to arbitration.[11] It has been held, under the New York statute, that the statute applies to causes of action which arose before the statute was enacted as well as after, but not to an action which had been in litigation for some time prior to the enactment of the statutes.[12] The general acceptance by the courts of other states of specific performance in the form provided by the American statutes ought to follow. The feeling that specific performance is impracticable in these cases should disappear as the ease and practicability of the remedy is demonstrated under the statutes. The justice and expediency of the remedy in these cases have always been self-evident.

§ 65. **Building Contracts and Similar Contracts Requiring Supervision.** Contracts to build and to make repairs have been refused specific enforcement in equity partly because of the supposed difficulty of supervising performance and partly because of uncertainty as to details and methods of construction, the extent and cost of the repairs to be made, and similar matters not settled in detail by the contract, but left to the discretion of the defendant, limited only by a reasonable construction of what his contract required of him.[13] That equity has power to

tions or transactions involving commerce. Similar statutes have been enacted in Massachusetts, New Jersey and Oregon. See (1925), 25 Col. L. Rev. 822.

11 Eng. Common Law Procedure Act (1851), § 11; Eng. Arbit. Act (1889), § 4.

12 Berkovitz v. Arib & Houlberg, Inc., 230 N. Y. 261, 130 N. E. 288 (1921).

13 In some of the early cases decrees were made requiring the building of a house by a defendant. Holt v. Holt, 1 Eq. Abr. 274, pl. 11, s. c. 2 Vern. 322, 23 Eng. Rep. 808 (1694); Allen v. Harding, 2 Eq. Ab. 17, pl. 6, 22 Eng. Rep. 14 (1708), and City of London v. Nash, 3 Atk. 512, 26 Eng. Rep. 1095 (1747), cited 1 Ames, Cas. Eq. 68.

In Beck v. Allison, 56 N. Y. 366 (1874), the court refused specific performance of a covenant by a landlord to repair damages caused by fire, extensive repairs practically equivalent to rebuilding being required. "The court must first adjudge what repairs are to be made and the time within which they are to be done. . . . It is obvious that the execution of contracts of this description under the supervision and control of the court would be found very difficult if not impracticable, while the remedy at

act in these cases, and can do so effectively without the need of detailed supervision by the court or its representative, is established by the cases granting specific performance where the land to be improved is in the possession of the defendant, so that the plaintiff cannot make the improvement and charge the defendant with the cost, leaving him without a substantial remedy at law.[14] Where the remedy at law is clearly inadequate, therefore, the bogy developed by the courts in the earlier cases of the difficulty of necessary superintendence has been disregarded. The courts now realize that superintendence by the court or its representative is unnecessary, that the court is called on merely to construe the contract and to make a decree ordering its performance accordingly, leaving to the plaintiff the privilege of raising the question thereafter as to whether or not the decree has been complied with, with undoubted power in the court to compel full performance. Impracticability of specific performance because of difficulty of superintendence by the court, may be regarded as an exploded doctrine under the prevailing and better considered cases.[15]

law would in nearly if not in all cases afford full redress for the injury.''

See additional cases in text and notes following.

14 Beck v. Allison, *supra* note 13, a leading American case, admits this exception, the court saying: ''The case enforcing the specific performance of an agreement made by a railroad company with a land owner, to construct an arch under their road for his use, does not militate against this doctrine. Damages in an action at law would not, in such a case, afford adequate redress.'' See Mayor &c. of Wolverhampton v. Emmons (1901), 1 K. B. 515, in which specific performance was decreed of a covenant to erect eight houses on land sold by the plaintiff to the defendant, the purpose being to have the land developed so as to be available for purposes of taxation and general advantage to the city, and the plans of the houses having been worked out in sufficient detail, and the remedy of damages being speculative and inadequate. Many other cases in which specific performance was decreed of contracts for improvements on land held by the defendant, precluding the plaintiff from making them himself, and it appearing that the plaintiff had a substantial interest in performance, and that damages would be inadequate, are cited in 1 Ames, Cas. Eq. 78, n., including Stover v. Great Western Ry. Co., 2 Y. & C. C. C. 48, 63 Eng. Rep. 21 (1842), Darnley v. London, etc., Ry. Co., 1 D. J. & S. 204, 46 Eng. Rep. 80 (1863), Lytton v. Great Northern Ry. Co., 2 K. & J. 394, 69 Eng. Rep. 836 (1856), involving specific enforcement of contracts by the defendants to build improvements on their own land for the benefit of the plaintiffs.

15 In Mayor of Wolverhampton v. Emmons, *supra* note 14, Smith, M.

Indefiniteness of detail in the contract appears to be a more serious objection to specific enforcement. On analysis, however, the question seems to be whether a valid contract exists or not. If it is so indefinite in detail that it does not express the intent of the parties in any definite way, so that it cannot be reasonably interpreted as requiring any definite action on the defendant's part, there is no valid contract, or at least that part of the contract affected by such indefiniteness is void, so that damages can not be recovered at law, and specific performance is impossible in equity.[16] On the other hand if a valid contract

R., referring to the objection that the court cannot superintend building contracts, said: "Of which last objection I have never seen the force." In Stover v. Great Western R. Co., *supra* note 14, the court said: "There is no difficulty in enforcing such a decree. The court has to order the thing to be done, and then it is a thing capable of solution whether the order has been obeyed." In Jones v. Parker, *post* note 17, Holmes, J., said: "There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time. Fry, Spec. Perf. (3d Ed.), §§ 88, 98, 102, 103; 2 Story, Eq. Jur. §§ 725–728; Y. B. 8 Edw. IV, pl. 11; Tyngelden v. Wareham, 2 Ch. Cal. liv." In Brummel v. Clifton Realty Co., *post* note 17, the court said that ". . . the difficulties, in the way of granting such relief anticipated by the courts in the earlier cases, were more conjectural than real," as shown by the cases in which specific performance of building contracts have been enforced where relief at law was inadequate, as discussed in Pomeroy, Specific Performance, § 23.

16 As to invalidity of contracts for uncertainty at law see 1 Williston, Contracts, § 37, *et seq.* Prof. Williston says (3 *Ibid.* 2541): "A court of equity cannot grant specific performance unless a decree can be framed which states with some exactness what the defendant must do. This necessity makes a degree of certainty necessary for equitable enforcement of a contract which is not always requisite for its enforcement at law." There is no suggestion of any practical test by which a contract sufficiently certain to permit a recovery of damages may be distinguished from a contract sufficiently certain to be specifically enforced. It is submitted that a valid contract must be capable reasonably of a construction which definitely fixes the defendant's obligations of performance, otherwise we would have valid contracts binding the defendant to something in a general way but to nothing in particular, a manifest absurdity. The amount of damages will often be uncertain [see § 61, *supra*], and specific performance is often decreed for this reason alone. But in all these cases there is no uncertainty as to the things which the defendant is required to do under the contract as construed by the court. See cases in note following.

exists it must be capable of a construction which requires certain definite action from the defendant, failure in which is the basis of the fixing of damages by the jury. Surely if it is sufficiently definite for a jury to assess damages for its breach, it is sufficiently definite for specific enforcement by the court.[17]

[17] In Jones v. Parker, 163 Mass. 564, 40 N. E. 1044 (1895), in specifically enforcing a covenant by the landlord "to deliver possession to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises," Judge Holmes said: "With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work." In Lawrence v. Saratoga Lake R. Co., 36 Hun. 467 (N. Y. 1885), Durfee, Cas. Eq. 290 n., the court said (at 472): "To insist that the railroad cannot build a bridge because they do not know whether it should be of wood, of iron, or gold, or platinum, is a poor excuse. A bridge suitable for a highway crossing is what is intended and that is definite enough. . . . We have these two alternatives: either the agreement is so indefinite that the court cannot determine when it has been performed. In that case it is void, and the defendants must surrender up the land. Or it is definite enough for the court to decide whether it has been performed."

In Lane v. Pac. &c. R. Co., 8 Idaho 230, 67 Pac. 656 (1901), in decreeing specific performance of a contract "to build a switch or sidetrack on said ranch at or near the dwelling." . . . &c., the court held that a specification of the size and exact position of the switch in the contract was unnecessary. It was a matter largely within the pleasure of the defendant, provided it was built so as to be capable of use in the manner and for the purposes for which switches are ordinarily used.

In addition to these cases see cases involving extensive construction and continuous performance extending over long periods in notes following, in which a great many matters of detail were not specifically provided for in the contract, but necessarily left to the defendant in his performance of the contract, subject to the duty of substantially accomplishing the results which the contract called for. Cases such as Inglis v. Fohey, 136 Wis. 28, 116 N. W. 857 (1908), stand for the well settled rule that where uncertainties in the contract may be cleared up by parol evidence of attendant circumstances so that the real intent is reasonably clear, the contract is valid and will be enforced. If no time of performance is fixed, performance is to take place within a reasonable time. In the absence of evidence of a contrary intent the usual terms and provisions shall appear in a deed or lease to be executed and delivered under the contract. See Bennett v. Moon, 110 Neb. 692, 194 N. W. 802

The real question involved in cases of building contracts and other contracts of an affirmative sort involving considerable detail and an extended period of time for their performance is whether or not enforced specific performance is as expedient as the performance of the work by the plaintiff himself through another contractor or otherwise, and the recovery of the cost, or the additional cost, by an action for damages. The usual executory contract between owner and contractor to build a house or to make other improvements may best be enforced against the defaulting builder by having the work done by another contractor who will be able and willing to perform the contract, followed by the recovery of the additional cost as damages. The inexpediency of enforcing specific performance against the unwilling contractor in the usual case is clear.[18] But in special cases where the plaintiff cannot do the work which the contract calls for himself, or have it done by another contractor, as where the building is to be done on the land of the defendant, specific performance is the only adequate remedy.[19] In other cases not executory on both sides, where the cost of the improvements are to be financed by the defendant, as in the case of a

(1923), 2 Cook, Cas. Eq. 86. See criticism by Dean Pound (1920), 33 Harv. L. Rev. 434, of the case, Feenaughty v. Beall, 91 Ore. 654, 178 Pac. 600 (1919), he said: "The court could very well leave the details to the choice of the defendant where the contract did. But the old notion, intrenched in text books and encyclopedias, dies hard." See *post* note 40.

18 See cases in the preceding notes, all of them either expressly or tacitly recognizing the rule that building and other similar contracts executory on both sides will not be specifically enforced when the plaintiff may have the work done by others and be fully compensated by damages recovered from the defendant. See also Madison Athletic Ass'n v. Brittin, 60 N. J. Eq. 160, 46 Atl. 652 (1900); Pac. Elec. R. Co. v. Campbell-Johnson, 153 Cal. 106, 94 Pac. 623 (1908).

19 See cases *supra* note 14. A good illustration is Strauss v. Estates of Long Beach, 187 App. Div. 876, 176 N. Y. Supp. 447 (1919), in which a covenant to build a sewer was specifically enforced against the defendant, a real estate development company, which contracted to build the sewer in connection with the sale of a building plot to the defendant. The plaintiff could not build the sewer in the defendant's property, and a sewer was necessary to the enjoyment of the plaintiff's dwelling, making damages obviously inadequate. See, also, Hubbard v. Kansas City &c. R. Co., 63 Mo. 68 (1876); Chambersburg v. Chambersburg &c. R. Co., 258 Pa. 57, 101 Atl. 922 (1917).

landlord who covenants to make improvements involving a considerable expenditure, and to give possession of the leased premises with such improvements completed, the remedy at law is inadequate exactly as in cases of trespass where the defendant has piled the plaintiff's land high with rock, soil or other refuse, discussed heretofore.[20] In those cases the defendant was required by mandatory injunction to end the continuing trespass by removing his material because it would be unfair to make it necessary for the plaintiff to undertake the task of such removal and disposition where it would involve considerable trouble and financial outlay, in the hope of recouping the cost in an action for damages. Specific relief, by which the wrongdoer is compelled to undo his wrong, is a better and more adequate remedy. So in any case where performance by the plaintiff of the work called for by the contract would subject him to an unreasonable burden in directing and financing the operation, specific performance should, and under the modern cases will, be enforced as definitely superior to damages. For this reason the court in a Massachusetts case decreed specific performance of a contract by a landlord to complete the building with sufficient apparatus to heat and light it during the term of the lease.[21] The tenant was entitled to have the premises delivered to him with the improvements which the contract called for. In a Maryland case[22] specific performance of a contract to complete a house which the defendant sold and conveyed to the plaintiff, and for which the defendant had been paid, was decreed by the court, based upon the contention of the plaintiff that it would be difficult for the plaintiff to finance the work of completing the house.

Contracts calling for continuous performance for an unlimited time were generally denied specific enforcement as a

20 See *supra* § 30, notes 27 and 28.

21 Jones v. Parker, 163 Mass. 564, 40 N. E. 1044 (1895). To same effect, N. Y. Cent. R. Co. v. Stoneman, 233 Mass. 258, 123 N. E. 679 (1919), holding that a covenant that the "demised premises shall be heated by the lessors to a proper warmth for office purposes" should be specifically enforced, reversing a decree to the contrary.

22 Brummel v. Clifton Realty Co., 146 Md. 56, 125 Atl. 905 (1924), 2 Cook, Cas. Eq. 72. The court cites Williams v. Lowe, 79 N. J. Eq. 173, 81 Atl. 760 (1911), in which a contract to convey an unfinished house, involving incidentally the completion of the house, was specifically enforced.

matter of course in the earlier English and American cases. The difficulties of superintendence which were supposed to make contracts to build or to repair as a practical matter unenforceable specifically were intensified in these cases. Thus in Marble Co. v. Ripley,[23] the court said: "The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time be called on to determine, not only whether the prescribed quantity has been delivered, but whether every block was from the right place. . . . " etc. These cases, however, differ in no essential respect from those already considered. Where damages will be adequate there is no occasion for specific performance, and in the usual case of a contract calling for continuous performance for an indefinite time which is executory on both sides, so that performance by one party will keep pace with and be dependent on performance by the other, damages may be the better remedy as a practical matter, as in similar cases of building contracts. But where damages are clearly inadequate, as where a railroad company had covenanted to maintain a station on the plaintiff's property in return for a right of way which had been conveyed to them,[24] or where the plaintiff railroad company had changed its position and incurred heavy expenditures relying on a con-

[23] Marble Co. v. Ripley, 77 U. S. (10 Wall.), 339 (1870). Specific performance of contracts to develop and operate mines was denied in Wheatley v. Westminster Co., L. R. 9 Eq. 538 (1869), Stanton v. Singelton, 126 Cal. 657, 59 Pac. 146 (1899), and Koch's Appeal, 93 Pa. 434 (1880). Contracts for the use of railroad tracks and equipment or other operation of a railroad were denied specific performance in the earlier cases. Powell Duffryn Steam Coal Co. v. Taff Vale R. Co., L. R. 9 Ch. App. 331 (1874), 1 Ames, Cas. Eq. 79; Blackett v. Bates, L. R. 1 Ch. App. 117 (1865); Port Clinton R. Co. v. Cleveland & Toledo R. Co., 13 Oh. 544 (1862), [cited and relied on in Marble Co. v. Ripley, *supra*].

In Barnes v. City of London Real Prop. Co., [1918] 2 Ch. 18, a contract by the lessors to "appoint and pay a housekeeper to be in attendance between the hours of 8 A. M. and 10 P. M. on each week day" to perform miscellaneous duties for the benefit of the plaintiffs, tenants of apartments leased to them by the defendants, was denied specific performance, though damages was regarded as an inadequate remedy, the difficulty of determining just what duties were required of such housekeeper, and of enforcing their performance being regarded as too great, a kind of relapse to the notions of the earlier cases.

[24] Hood v. North Eastern R. Co., L. R. 8 Eq. 666 (1869).

tract for the continued and perpetual use of the tracks of another railroad company,[25] justice demanding in each case the specific performance of the contract, the courts have found no difficulty as a practical matter in granting and enforcing specific performance, proving that the fears expressed in the earlier cases were largely imaginary. The rights arising under such contracts are settled finally by the decree. Whether or not the decree is substantially complied with or violated thereafter will be determined when the question is raised by the plaintiff.[26] The picture conjured up in some of the earlier cases of the court everlastingly superintending the continuous performance of the contract is proved to be a complete misconception of what is involved as a matter of reality. Where public rights are involved either directly under contracts between municipalities and public service companies, or indirectly in contracts between railroads, the courts will the more readily enforce the

25 Union Pac. R. Co. v. Chicago, R. I. &c. R. Co., 163 U. S. 564. 16 Sup. Ct. 1173 (1895).

26 See preceding note. The court said: "Its exercise (specific performance) prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Referring to the argument that specific performance of contracts requiring continuous acts involving skill, etc., is impracticable, the court said: "The decree is complete in itself, is self-operating and self-executing and the provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract.

"It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. . . . It was objected in Joy's case that the court was proposing to assume the management of the railroad 'to the end of time,' but Mr. Justice Blatchford, speaking for the court, responded that the decree was complete in itself and that it was 'not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances.'"

In Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243 (1891), Judge Blatchford preceded the statement quoted above with the remark as to continuous superintendence: "But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver." It is clear that no such supervision is involved under a decree for specific performance as exists in cases of operation under a receiver. This remark serves to remind us of the broad powers of superintendence adequately exercised by equity where the need exists. See cases in note following.

contract specifically. Damages cannot measure the loss which the public would sustain through failure of public service secured by the contract. The relations of railroads toward each other under operating contracts necessarily involves the public as a third party, because of the public franchises under which the roads operate, based on the public service for which they exist, and the interests of the public are very properly considered in the enforcement of such contracts between the railroad companies.[27] The inadequacy of damages as a remedy is, of course, the basis of specific performance in all these cases, the protection of public rights being in the nature of a make-weight reason.

§ 66. **Contracts for Personal Service.** It is settled law that affirmative contracts for personal service will not be specifically enforced even though the remedy at law is inadequate because of the unique quality of the service contracted for and the difficulty of getting like service from others.[28] To compel personal service from an unwilling defendant would do more harm than good, and though damages may be inadequate that remedy is better as a practical matter than the forced rendering of the service. Even where damages are inadequate because of the

[27] Joy v. St. Louis, *supra* note 26; Union Pac. R. Co. v. Chicago, Rock Island, etc., R. Co.. *supra* note 26; Donovan v. Penn. R. Co., 199 U. S. 279, 26 Sup. Ct. 91 (1905); Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co., 144 N. Y. 152, 39 N. E. 17 (1894); Larchmont v. Larchmont Park, 185 App. Div. 330, 173 N. Y. Supp. 32 (1918); City of La Follette v. La Follette Water, etc., Co., 252 Fed. 762 (1918), [the court providing that the case be retained on the docket so that failure to comply with the decree, or modification thereof called for by changed conditions or advances in science, might be taken care of. Dean Pound speaks of this provision as "an admirable example of a court of equity at its best"]; Cumberland, etc., R. Co. v. Gettysburg, etc., R. Co., 177 Pa. 519, 35 Atl. 952 (1896); Chambersburg v. Chambersburg, etc., R. Co., 258 Pa. 57, 101 Atl. 922 (1917); B. & O. R. Co. v. West. Union Tel. Co., 241 Fed. 162 (1917).

[28] Sanquirico v. Benedetti, 1 Barb. 315 (N. Y. 1847); De Rivafinoli v. Corsetti, 4 Paige 264 (N. Y. 1833), [the court discussing the effect on an opera singer and his performance of a decree ordering him to sing, or of imprisonment in case he refused]. See cases in notes following, all involving the rule, directly or indirectly, that an affirmative contract of this kind will not be enforced by decree for specific performance.

unique quality of the service to be given, equity will not directly enforce the contract because of the interference with personal liberty which would result. However, if a person of unique ability expressly agrees, as one of the terms of his contract of service, that he will not render such service to anyone else during the term of his contract, the negative promise will be specifically enforced. This is true only where the services of the defendant are unique, so that damages at law would be inadequate, and the affirmative promise is not enforced in equity for the sole reason that such enforcement would be impracticable. It follows that the defendant is a wrongdoer freed from specific performance of his affirmative contract, not because such enforcement would be unjust, but because the means to enforce it do not exist as a practical matter. By enforcing the negative promise not to engage in the same line of service with others the defendant will usually be induced to perform the affirmative contract of service rather than to remain idle, and the negative promise will not be enforced except as the plaintiff stands ready and willing to permit the defendant to perform the affirmative contract for the compensation agreed upon.[29] These cases have

29 Lumley v. Wagner, 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1852), [contract to sing by a famous singer at plaintiff's theatre, and not to sing elsewhere during the period of the contract. The court said: "It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement."] Montague v. Flockton, L. R. 16 Eq. 189 (1873), [asserting that such a negative promise would be implied from the affirmative and that the negative will be enforced though the plaintiff will not now employ the defendant, having engaged another in his place. Both propositions are contrary to the prevailing law]; Stocker v. Wedderburn, 3 K. & J. 393, 69 Eng. Rep. 1162 (1857), [the court declaring at 405, 69 Eng. Rep. at 1167, ". . . the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved."] In Whitwood Chem. Co. v. Hardman, [1891] 2 Ch. 416, the Court of Appeal pointed out that Malins, V. C., was mistaken in his construction of Lumley v. Wagner, that Lord St. Leonards stated explicitly that he would have denied the injunction in that case if there had been no express negative promise. The court held that there must be an express negative promise not to work for others, or

been criticized as having for their purpose the enforcing of the affirmative contract of service; that what the courts cannot do directly they should not attempt to do indirectly.[30] The sufficient answer is that the affirmative contract of service ought to be performed, as damages would be an inadequate substitute; and as the enforcement of the negative promise by injunction is entirely practicable, that means should be used to bring about what justice demands, viz., the performance of the contract of service by the defendant voluntarily, rather than to remain idle

one clearly and definitely to be implied as a fact, to justify an injunction, as a negative promise will not be implied merely from the affirmative.

In Tribune Ass'n v. Simonds, 104 Atl. 386 (N. J. Eq. 1918), an agreement by defendant not to write for or contribute to any other periodical or publication during his term of service as editor was specifically enforced. The unique value of the defendant's services made damages for their loss inadequate. The court said: "This case presents a situation entirely different from the ordinary breach of a contract, where the injured party may go into the open market and supply his wants, and where the difference in cost measures the damage. Here the services engaged were of a peculiar character, and for the loss of which the damages are unmeasurable, at law, and hence the preventive remedy. . . . The Tribune is entitled under its contract to the services of Mr. Simonds. . . . In the protection of these rights the Tribune is entitled to the aid of this court in so far as this court can afford protection. It, of course, cannot compel Mr. Simonds to labor for his employer, but it can restrain him from giving the benefit and advantage of his services, and the resulting profits, to another." It is clear that the purpose of the court was to bring about performance of the affirmative contract of service by enjoining a breach of the negative promise.

30 Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180 (1895). The court refused to enforce the negative promise because the plaintiff was heavily in default in payments to be made to the defendant under the contract of service, and was unable to perform on his side. Judge Holmes, who decided the case on the trial, is quoted in (1894), 8 Harv. L. Rev. 172, as saying, after asserting that all agree that equity will not compel performance of a contract to sing: "If this is so, as is admitted, it appears to me, with all respect to judges who may have taken a different view, that there is no sufficient justification for saying to an artist that although I will not put him in prison if he refuses to keep his contract, I will prevent him from earning his living otherwise, as a more indirect means of compelling him to do the same thing." See *dictum* to same effect and criticism of Lumley v. Wagner by Lindley, L. J., in Whitwood Chem. Co. v. Hardman, *supra* note 29.

or to engage in some other occupation.[31] The relation of the doctrine of mutuality of performance to these contracts will be discussed hereafter.[32]

The negative promise not to engage in like service for another will not be enforced unless the services to be rendered by the defendant are unique in the sense that the services of another person equally qualified cannot be readily secured. Therefore such a contract made by a salesman[33] or by an actor without outstanding merit and reputation,[34] will not be enforced in equity. For this reason a contract by an employe of the usual type not to engage in a similar line of employment with a competitor for a stated time after his employment is ended will not be specifically enforced, as the remedy at law is adequate,[35]

31 See quotation from Tribune Ass'n v. Simonds, and quotation from Lumley v. Wagner, *supra* note 29. Dean Pound has stated [(1920) 33 Harv. L. Rev. 438, *et seq.*] that the negative promise should not be enforced except where its breach results in damage independent of the damage from breach of the affirmative contract. He said:—"Where breach of the negative involves a damage by itself apart from or over and above breach of the affirmative, it can be no objection to the enforcement of that negative that it may tend to enforce an affirmative that ought to be performed. . . . If they obstinately refuse to avail themselves of the opportunity to have all that the contract calls for, by remaining idle when enjoined from breaking the negative covenant, they ought not to be heard to complain. Great hardship upon plaintiff, as, for example, in Tribune Ass'n v. Simonds, *supra,* may properly move the court to attach little weight to the possibility that the defendant, by doing nothing, may perform part of the contract with no equivalent." If it be admitted that the affirmative contract ought to be performed in that damages are inadequate, the impracticability of a direct decree for specific performance being the sole reason for denying it, it would seem to follow that enforcement of the negative is justified though its sole purpose is to bring about the performance of the affirmative contract.

32 See *post* § 70.

33 Bronk v. Riley, 50 Hun. 489 (N. Y. 1888); Jaccard Co. v. O'Brien, 70 Mo. App. 432 (1897).

34 Carter v. Ferguson, 58 Hun. 569 (N. Y. 1890). In Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902), the negative promise of a baseball player was specifically enforced because of the unique quality of the defendant's services as a player of outstanding skill. See, also, Daly v. Smith, 49 How. Pr. 150 (N. Y. 1874); Posner Co. v. Jackson, 223 N. Y. 325, 119 N. E. 573 (1918); Taylor Iron etc. Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186 (1908); Driver v. Smith, 89 N. J. Eq. 339, 104 Atl. 717 (1918).

35 Menter Co. v. Brock, 147 Minn. 407, 180 N. W. 553 (1920); Stern-

though if it appear that he has been entrusted with secrets of the employer's business he may be enjoined from using such secrets in competition with his former employer, either in a business of his own or in the employ of any other person.[36]

§ 67. **Negative Contracts Not Involving Personal Service.** The practical difference in equity between affirmative and negative contracts is the supposed difference in the ease and feasibility of enforcing them by specific performance. The hesitancy of equity to grant relief by way of mandatory decree requiring the defendant to perform affirmative acts extending over a period of time, making such decrees unusual, and the ease of enforcing negative contracts by merely enjoining the defendant from committing a breach, the injunction being the usual form of equitable decree, explains this difference. Lord Eldon's expedient in a leading case[37] by which he compelled the defendant to restore a stop-gate in a canal, the removal of which diverted water from the plaintiff's mill, by restraining the defendant from preventing the plaintiff from having the use and enjoyment of the canal "by continuing the removal of the stop-gate," was obviously a mere verbal twist by which a mandatory order was made to sound like a negative injunction. All trace of any such practice has disappeared,[38] and when equity gives relief by mandatory order, whether in specific enforcement of contracts or in other situations, no attempt is made to disguise it in the form of a negative injunction. No fundamental difference exists between specific enforcement of affirmative and negative contracts. The objection of impracticability never applies to negative promises, as their enforcement by injunction is the normal form of equitable relief. To secure their enforcement in equity the inadequacy of damages must be established exactly as in the enforcement of affirmative contracts. This is illustrated by cases of negative promises in contracts of service, discussed above, one of the most usual forms of negative promises enforced in equity. The enforcement in equity of negative restrictive covenants af-

berg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348 (1891).

36 See *ante* § 45.

37 Lane v. Newdigate, 10 Ves. 192, 32 Eng. Rep. 818 (1804).

38 Ryan v. Mut. Ass'n, [1893] 1 Ch. 116, Lord Esher, referring to this action by Lord Eldon, said: "That is a doctrine that I, for one, must decline to follow."

fecting the use and enjoyment of land results in the creation of equitable easements protected and enforced as rights *in rem*, and therefore such restrictions require separate treatment hereafter.[39] The most important class of negative contracts remaining to be considered are contracts not to compete made by a vendor as part of his contract in selling a business. As the damages arise from depriving the plaintiff of exclusive business rights which he has purchased and paid for, for which money damages are clearly inadequate, these contracts are regularly enforced in equity.[40] In any case, whether falling within the groups above referred to or not, a negative contract will be specifically enforced if the remedy at law would be inadequate.[41]

39 See Ch. XVIII, *post*.

40 Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419 (1887); Francisco v. Smith, 143 N. Y. 488, 38 N. E. 980 (1894); Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509 (1898); Richardson v. Peacock, 26 N. J. Eq. 40 (1875), 28 N. J. Eq. 151 (1877) and others cases cited, 1 Ames, Cas. Eq. 124, n. 3. See long list of cases cited 3 Williston, Contracts, 2574, 2575, n. 41. See Feenaughty v. Beall, 91 Ore. 654, 178 Pac. 600 (1919), in which the court refused specific performance because of uncertainty of the territory to be included within the negative agreement, the covenant restricting the defendant "from engaging in the same line of business in or about the city of Portland or this territory whereby the interests of Beall & Co. will be in any measure interfered with." Commenting on this case in (1920) 33 Harv. L. Rev. 434, Dean Pound said: "If the courts ought not to be wiser than the parties and make their contracts over for them, they ought not to conjure up objections that blind them to what the parties have agreed to and thus defeat fair business transactions." See *supra* note 17. As to validity or invalidity of contracts tending to restrain trade, see 3 Williston, Contracts, 2871 *et seq.*

41 Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77 (1898), enforcing a contract not to establish a water system, part of a contract of the city to take its water from the Water Co. Contracts by dealers or agents handling plaintiff's goods not to sell competing goods of others were enforced in Butterick Pub. Co. v. Fisher, 203 Mass. 122, 89 N. E. 189 (1909); Peerless Pattern Co. v. Gauntlett Dry Goods Co., 171 Mich. 158, 136 N. W. 1113 (1912); Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408 (1898). See additional cases cited, 3 Williston, Contracts, 2582, n. 71.

CHAPTER XIV

THE PRINCIPLE OF MUTUALITY IN SPECIFIC PERFORMANCE

§ 68. **Mutuality of Remedy as a Reason for Specific Performance.** A vendor of land or of a unique chattel or of stock or other personalty of speculative value may enforce specific performance against the purchaser just as the purchaser may enforce specific performance against him, and for exactly the same reason, viz., the inadequacy of damages. The purchaser is entitled to the specific land or thing because he cannot buy the same thing, or the price which he will have to pay for the stock or other thing is uncertain and speculative so that his damages in an action at law would be speculative and uncertain.[1] The vendor's right to damages is equally unsatisfactory. In the case of a contract to sell land the vendor's damages at law, the difference between the contract price and the market value of the land, will generally be a very small part of the purchase price, very often nominal, and often the market value will exceed the contract price. He is left at law with land for which there is no ready market, and he may be required to carry it for years, paying interest, taxes and other carrying charges, before he finds a purchaser or even a tenant. The contract gives him a right to the purchase price, and to permit the purchaser to pay damages at his option instead of performing the contract would surely be a "travesty of justice," as it has been called by the Supreme Court of the United States.[2] If damages are in-

[1] §§ 59, 60, 61, *ante*. See cases *post* note 2.

[2] By Chief Justice Fuller in Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173 (1895).

In Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979 (1889), the court expressed the true reason for allowing specific performance to the vendor as follows: "In the action at law for breach of the contract the plaintiff could only recover the excess, if any, of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, and courts

adequate to compensate the purchaser against a defaulting vendor in cases of contracts to sell unique chattels, stocks, bonds,

of equity, therefore, hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed.'' So in sustaining a similar decree in favor of the vendor, the court, in Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331, 10 Eng. Rep. 928 (1855), said: ''Generally speaking, pecuniary damages adequate to the pecuniary loss sustained from the breach of the contract would be an indemnity to the vendor; but still damages would not place him in the same situation as if the contract had been performed, for in that case he would have entirely got rid of his land, and he would have in his pocket the net sum for which he had agreed to sell it; whereas if he is driven to his action at law, he retains the land, and he can only recover the difference between the stipulated price and the price which it would probably fetch if resold. . . . In every case justice requires that the purchaser should be entitled to specific performance, . . . and there must be reciprocity of remedy between vendor and purchaser. Indeed the remedy must necessarily be afforded to the vendor as well as purchaser, from the well-known doctrine of conversion upon the signing of a valid contract for the sale of land, the equitable estate then vesting in the purchaser, and the vendor then holding the legal title only as his trustee.''

The above quotation gives, first, the obvious reason for specific performance in favor of the vendor, viz., the inadequacy of damages as his remedy. Second, the discredited doctrine of mutuality of remedy discussed in the text in the following paragraph. Third, the doctrine of equitable conversion as a reason for giving the vendor specific performance. See *post* notes 10, 11, 12 and text to which they refer as to this last point.

In Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626 (1887), the court said: ''Equity compels specific performance in favor of a vendor, not on the ground of mutuality of remedy, but because compensation in damages, measured by the difference in price as ascertained by the market value and by the contract, is not regarded as adequate indemnity for the non-fulfillment of the contract. Jones v. Newhall, 115 Mass. 244, 248; Old Colony R. R. v. Evans, 6 Gray 25.'' Here the court refused to decree at suit of the vendor specific performance of a contract to sell a boat worth $5,000 for stock worth $3,500, though specific performance of contracts for the sale of vessels is generally given the vendee because of the inadequacy of damages, and the present case was a particularly clear illustration of the inadequacy of damages as a remedy to the vendor, who was left with the boat on his hands, and because of the value of the boat over the value of the stock he could not prove any damages in an action at law. For a list of cases holding that the vendor of land may maintain specific performance see 3 Williston, Contracts, 2571, n. 25.

or articles of any kind not readily procurable, and having no established market value, they are equally inadequate in favor of a vendor against a defaulting purchaser, as he will be subject to exactly the same difficulty in establishing his damages which would be equally speculative and uncertain. Therefore the vendor may have specific performance for the same reason that explains similar relief to the vendee, viz., inadequacy of damages.[3] It is for this reason that courts of law have given vendors of chattels what is in effect specific performance by giving the vendor an action for the entire purchase price, the Uniform Sales Act more logically limiting such actions to cases in which the goods involved are not readily saleable.[4]

One of the oddest chapters in the law is the doctrine of mutuality as it has been applied in cases of specific performance. It was stated by Fry in his work on Specific Performance[5] that the remedies of both parties must be mutual, so that if for any reason specific performance is impossible or impracticable as a remedy for one of the parties it cannot be given to the other, the necessary corollary being that if the right to specific performance exists in favor of one of the parties, the other party must be given the same remedy if it is not impossible or impracticable. Hence the doctrine that because of mutuality of remedy the vendor of land or chattels may maintain specific performance because the purchaser has that remedy, irrespective of whether his remedy at law is adequate or not.[6] There never was the slightest reason for the doctrine of mutuality of remedy. It has a plausable sound which seems to have misled many judges and writers, but its essential falsity has been so completely exposed that except where the error has been established in the form of a statute, as in California, it may be regarded today as completely discredited and discarded.[7] Today, therefore, the fact that one of the parties cannot have specific performance is no reason at all why the other party cannot. Either may be entitled to specific relief, depending entirely on whether

3 Rothholz v. Schwartz, 46 N. J. Eq. 477, 19 Atl. 312 (1890); Phillips v. Berger, 2 Barb. 608 (N. Y. 1848). See list of cases to same effect cited, 36 Cyc. 567.

4 See § 60, notes 22–25, *ante*.

5 5th Ed., 231; 6th Ed., 219.

6 For a statement of this rule as part of the doctrine of mutuality of remedy see 3 Williston, Contracts, § 1443.

7 See *post* § 69.

his remedy at law is adequate. Mutuality of performance of the contract between the parties is an entirely different matter, having nothing to do with Fry's doctrine of mutuality of remedy.[8] The entire basis for the supposed rule that the vendor may have specific performance in any case where the vendee has that remedy having been discredited and discarded, it follows that the rule in question is equally discredited.[9] As stated in the preceding paragraph, the vendor may have specific performance solely because damages would be an inadequate remedy, which is the only reason why the purchaser is entitled to specific relief in the cases there referred to.

Another reason for giving the vendor specific performance in these cases, suggested in one of the cases quoted above,[10] and developed in detail by Prof. Ames and others[11] is that the vendor-purchaser relation arising between the parties to a contract for the sale of land makes the purchaser equitable owner of the land and the vendor the holder of the legal title thereto as security for the payment of the purchase price, and the enforcement and protection of his rights require specific performance in his favor. But the vendor-purchaser relation arises out of the right to specific performance. If the purchaser must be entitled to the specific land, so also must the vendor be en-

[8] See *post* § 70.

[9] Where the defendant purchasers signed the contract and the plaintiff vendor did not, so that the defendants only were bound under the Statute of Frauds, specific performance against the defendant has been given though the defendant could not sue the plaintiff either at law or in equity. Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979 (1889), citing Clason v. Bailey, 14 Johns. 484 (N. Y. 1817), in which Chancellor Kent reviews the New York and English cases, concluding that "it is sufficient if the agreement be signed by the party to be charged. . . . There is nothing to disturb this strong and united current of authority but the observation of Lord Redesdale in Lawrenson v. Butler, 1 Shoales & L. 13, who thought that the contract ought to be mutual, and that if one party could not enforce it the other one ought not to." For other cases allowing specific performance against a defendant who has signed the contract though the plaintiff could not be held, under the Statute of Frauds, because he had not signed, see *post* note 16. See Eastern Counties R. Co. v. Hawkes, and Eckstein v. Downing, cited and quoted from *supra* note 2.

[10] Eastern Counties R. Co. v. Hawkes, *supra* note 2.

[11] Ames, Lectures Legal Hist., 380; Stone, The Mutuality Rule in N. Y. (1916), 16 Col. L. Rev. 443, 451.

titled to the purchase price instead of damages in order that this relation may exist.[12] The argument referred to, therefore, begs the question. Furthermore the reasoning therein fails to apply where because of fraud or other reason the purchaser is unable to enforce the contract, which, however, may be enforced by the vendor in spite of the purchaser's inability to get specific relief, proving conclusively that the trust or equitable conversion resulting from the right to enforce specific performance has no more to do with the vendor's right to specific relief than has the doctrine of mutuality of remedy.[13]

§ 69. **How the Doctrine of Mutuality of Remedy Was Discredited.** Professor Ames has pointed out nine distinct classes of cases in which specific performance may unquestionably be maintained by one of the parties though the other party has no such remedy.[14] Some of these are occasionally classed as exceptions to the rule of mutuality, but they are in no sense exceptions. They demonstrate conclusively that the doctrine laid down by Fry is unsound in principle and contrary to actual law. Together these so-called "exceptions" cover the field. It was held as early as 1684 that a contract in writing was enforceable against one of the parties who signed it, under the Statute of Frauds though not enforceable against the other who did not.[15] This has continued to be unbroken law ever since, though obviously in violation of Fry's doctrine.[16] Cases from 1814 to the

12 See Chapter XVII, § 86, *et seq.*, *post.*

13 See 3 Williston, Contracts, 2572, citing Clark (1917), 31 Harv. L. Rev. 274.

Prof. Williston says, (*Ibid.*), that however unsatisfactory the doctrine of mutuality of remedy may be as the reason for the vendor's right to specific relief, "historically this idea of mutuality is the basis of his right, and the new explanation is somewhat inadequate." Fry had practically nothing on which to base his doctrine, and his temporary success in getting some courts to accept his theory, now generally admitted to be without merit, is rather too recent to be treated as historical. In any event, the obvious reason for giving the vendor specific relief, *viz.*, inadequacy of his legal remedy, makes both of the other reasons entirely superfluous.

14 Ames, Lectures on Legal Hist. 370; *ibid.* (1903), 3 Col. L. Rev. 1–8.

15 Hatton v. Gray, 2 Cas. Ch. 164, 22 Eng. Rep. 895 (1684), 1 Ames, Cas. Eq. 421.

16 Hodges v. Kowing, *supra* note 9; Forthman v. Deeters, 206 Ill. 159, 69 N. E. 97 (1903); Record v. Littlefield, 218 Mass. 483, 106

present time establish the rule that an infant, on coming of age, may enforce a contract in equity in any proper case for specific performance, though he might set up infancy as a bar to an action against him.[17] An action started in his behalf before he attains his majority would be dismissed because the action and its resulting decree would not bind him. Lack of mutuality of performance, not lack of mutuality of remedy, is the reason for barring such an action.[18]

A fraudulent fiduciary may be compelled to perform a contract entered into by him in fraudulent violation of his principal's rights if the principal so elects, though obviously he would not have a corresponding remedy against his principal.[19] In any case of a contract induced by fraud, the party defrauded may elect to enforce the contract as made, though the fraudulent party has no corresponding remedy against him.[20] These, like the cases under the Statute of Frauds and of infants, prove conclusively that mutuality of remedy has nothing to do with the right of each party to maintain specific performance, just as it has nothing to do with the right of either party to recover damages at law. No one claims that there must be mutuality of remedy at law in order that either party may hold the other for damages. Why should there be a difference in this respect in the enforcement of the equitable remedy?

A defective title will not prevent enforcement of the contract by the purchaser, with compensation or deduction from the purchase price because of the defect, though the vendor cannot have specific performance because of his defective title.[21] On

N. E. 142 (1914); Smith v. Wilson, 160 Mo. 657, 61 S. W. 597 (1901); Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl. 404 (1908). See list of cases, 1 Ames, Cas. Eq. 424, n., and 3 Williston, Contracts, 2561, n. 93.

17 Clayton v. Ashdown, 9 Vin. Abr. 393 (G. 4) pl. 2, (1714); 1 Ames, Cas. Eq. 421; Ames, Lectures on Legal Hist. 374.

18 Flight v. Bolland, 4 Russ. 298, 38 Eng. Rep. 817 (1828), 2 Cook, Cas. Eq. 124. Where the infant has performed before attaining full age he may maintain specific performance, since there is no violation of mutuality of performance. Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638 (1917). As to this latter doctrine, see *post* § 70.

19 *Ex parte* Lacey, 6 Ves. 625, 31 Eng. Rep. 1228 (1802); Ames, Lectures in Legal Hist. *supra* note 14.

20 See §§ 105, 106, *et seq.*, *post*, as to enforcement of contracts induced by fraud. See Ames, Lectures etc., *supra* note 14.

21 As to enforcement in equity of such contracts see *post* § 76.

the other hand the vendor may maintain specific performance if he acquires a clear title in time to perform under the contract, though he had no title at all when the contract was made, so that before his acquisition of title specific performance against him would have been impossible for that reason.[22]

Unilateral contracts may be specifically enforced where the promise is to convey land or is any of the promises which equity enforces, though given in return for acts or payments which the other party has not promised to perform, and where for that reason no mutuality of remedy exists.[23] Similar situations arise in such cases where the promises are bilateral, and where the promisor has performed by rendering services or doing other things which equity could not compel by decree. The promise to convey in return therefor will be enforced where the plaintiff has performed, though the plaintiff could not have been compelled to perform at suit of the defendant prior to his actual performance.[24] In these as in the other cases above discussed

22 See § 75, latter part, notes 60–64, *post*. A few cases, misled by Fry's doctrine of mutuality of remedy, which hold to the contrary, such as Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900 (1893); Gage v. Cummings, 209 Ill. 120, 70 N. E. 679 (1904), and Norris v. Fox, 45 Fed. 406 (1891), may be regarded as overruled. As to the purchaser's right to rescind on discovering the vendor's lack of title see *post* § 75, latter part.

23 O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602 (1896), holding that an option under seal to buy land may be enforced by the purchaser though he cannot be compelled to perform unless he exercises the option. Options to purchase in leases of land, or options to renew are specifically enforced though mutuality of remedy is, of course, absent. Lawes v. Bennett, 1 Cox 167, S. C. 7 Ves. 436, 32 Eng. Rep. 177 (1785); Clark v. Clark, 49 Cal. 586 (1875); Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73 (1894); White v. Weaver, 68 N. J. Eq. 644, 61 Atl. 625 (1904). For additional cases of specific enforcement of unilateral contracts see 3 Williston, Contracts, 2563, n. 98; 1 Ames, Cas. Eq. 430, n. 3, 431, n. 2.

24 O'Regan v. White, [1919] 2 Ir. R. 339; Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536 (1897); Allen v. Cerro Gordo Co., 40 Iowa 349 (1875); Topeka Water Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715 (1895). In the latter case, holding that the plaintiffs be given specific performance, having performed their side of the contract, though they could not have been compelled to perform, viz., to prosecute a case in court as attorneys, the court said: "The doctrine that there must be mutuality in the contract, and that it must be capable of enforcement at the suit of either party at the time it is entered into . . . is subject to so many exceptions and such important quali-

there is a total absence of mutuality of remedy. The application of mutuality of performance to these cases is discussed in the following section.

§ 70. **Mutuality of Performance.** In the article above referred to Professor Ames stated the doctrine of mutuality of performance as the only principle of mutuality applicable to specific performance cases, as follows: "Equity will not compel specific performance by a defendant if, after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract."[25] Judge Cardozo stated the doctrine more accurately when he said: "What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant."[26]

fications that it is doubtful whether a court would ever be warranted in declaring the law so broadly. There are many contracts, originally unilateral, capable of enforcement when accepted. Many other contracts afford one party a remedy by an action for the recovery of money . . . while the other party may be entitled to a specific performance; still others, where the remedy of one party before any performance might be very inadequate, which are yet, after full performance on one side, capable of specific enforcement against the other."

In Epstein v. Glucken, 233 N. Y. 490, 135 N. E. 861 (1922), the assignee of the vendee was given specific performance of a contract to sell real property though the vendor would have had no action against the assignee who had not assumed the vendee's contract of purchase. Cardozo, J., said: "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule today [citing cases, also Stone, The Mutuality Rule in New York (1916), 16 Col. L. Rev. 443, 3 Williston, Contracts, §§ 1433, 1436, 1440]. What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant." *Contra*, assignee not entitled to specific performance because of lack of mutuality, Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237 (1918).

[25] See *supra* note 14. He also said, *ibid.*; "The reciprocity of remedy required is not the right of each party to the contract to maintain a bill of specific performance against the other, but simply the right of one party to refuse to perform unless performance by the other is given or assured."

[26] In Epstein v. Glucken, *supra* note 24.

It is a general principle of law as well as of equity that a plaintiff who is himself substantially in default will not be able to enforce the same contract against the defendant, either by recovering damages or by enforcing specific performance.[27] It must appear, therefore, that the plaintiff has substantially performed his side of the contract up to the time of the defendant's breach, before any question of mutuality of performance can arise. In a case where specific performance in the plaintiff's favor gives him the substantial benefits of the contract, but the plaintiff's performance in return is to extend over a considerable period of time, and is incapable of specific performance as a practical matter, so that the defendant's only remedy for a breach by the plaintiff will be damages which in the particular case will be inadequate, it is clear that a decree of specific performance might operate unfairly and oppressively, and therefore should not be given.[28]

In most cases, however, performance by both sides will be concurrent, performance by the plaintiff being essential to continued obligation to perform on the defendant's part under the decree. In such cases, if otherwise specific performance is the appropriate remedy, mutuality of performance is assured, as the decree will not bind the defendant in case the plaintiff fails to perform his part of the contract.[29] The specific enforcement

27 See *post* §§ 71, 72.

28 Stocker v. Wedderburn, 3 K. & J. 393, 69 Eng. Rep. 1162 (1857), is a case of this kind, the court refusing specific performance of a contract by defendants to incorporate a company for the purpose of working the plaintiff's patents, to pay plaintiff $2000 after incorporating, and to employ him at a salary, he to give his services exclusively for a term not exceeding two years to the business of the corporation. Because the contract of service could not be enforced against the plaintiff after performance by the defendants the court refused to compel the defendants to incorporate, assuming obligations in that connection, and to pay to the plaintiff the sum provided by the contract as they would be left with damages as their sole remedy, which remedy would be inadequate. In Buck v. Smith, 29 Mich. 166 (1874), the court refused specific performance of a contract to transfer real and personal property because the complainant's promise to become a partner and to manage and direct the business for an indefinite time could not be enforced by equity.

29 In Montgomery Traction Co. v. Montgomery Light, etc., Co., 229 Fed. 672 (1916), a contract to supply electric current was specifically enforced in favor of the Light & Power Company, though it was contended that specific performance against the Light & Power Company

of contracts to convey land is not prevented because the plaintiff vendee has undertaken in the contract to erect buildings, fences or other improvements which might not be enforceable in equity in an action against the vendee. The deed may provide for a forfeiture of the land in case of failure of the vendee to perform such provisions of the contract,[30] or covenants running with the land requiring the making and maintenance of fences or other improvements may be inserted in the deed, if a condition involving forfeiture is not contemplated by the parties.[31] Negative promises not to engage in the same service for others as part of a contract of personal service are enforced, where such services are special and outstanding so that damages would be inadequate, as the only practicable means of inducing the defendant to perform his contract of service in good faith.[32] If he carries out his contract, in accordance with his legal duty, he is assured of full counter performance by his employer; if his employer should fail in this the employe is at once relieved of his obligation under his negative promise, exactly as in the cases above referred to of concurrent performance on both sides. If he remains idle, so that he receives nothing for performance of the negative promise, it is the result of his wilful choice to violate his legal duty. He cannot complain that the decree is unjust or oppressive.[33]

could not have been enforced because of the impracticability of specific performance. The court pointed out that the plaintiff Power Company had fully performed for many years, and continued performance was assured because otherwise the defendant would be relieved from obligation under the decree. To same effect, Met. Elec. Co. v. Ginder, [1901] 2 Ch. 799, the decree providing for vacating the injunction in case of breach by the plaintiff. Similar contracts by public service corporations were enforced by similar conditional decrees in LaFollette v. LaFollette Water Co., 252 Fed. 762, § 65, n. 28, *supra*, and Elk Refining Co. v. Falling Rock Cannel Coal Co., 92 W. Va. 479, 115 S. E. 431 (1922). The broad extension of specific performance to many classes of cases involving very considerable affirmative action over long periods [see *ante* § 65], results in specific performance on both sides in such cases, eliminating all question of mutuality of performance.

30 Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19 (1893).

31 Boston & W. St. R. Co. v. Rose, 194 Mass. 142, 80 N. E. 498 (1907).

32 See *ante* § 66.

33 See cases cited and discussed *supra* § 66, notes 30–32 inc., particularly quotation from Dean Pound's article, § 66, note 31.

Contracts not to compete on the sale of a business or not to work for a competitor on quitting the plaintiff's employment, are fully paid for before their breach, and the question of mutuality of performance does not arise. They are enforced because the competitive injury to the plaintiff's business may not be adequately measured by money damages.[34]

Negative promises are not implied in the usual case from the affirmative promise. A contract to buy a house does not imply a promise not to buy any other house. A contract of service is broken by failure to render the service as agreed. It is a logical fallacy to regard the defendant's subsequent engaging in another service as a breach of his contract where he has not expressly bound himself to engage in no such service. Having broken his contract of service, he is chargeable with the breach, but not for how he may use his time thereafter, in the absence of an express negative.[35] A negative may sometimes be implied in

[34] See *ante* § 67, note 41. In Star Co. v. Press Pub. Co., 162 App. Div. 486, 147 N. Y. Supp. 579 (1914), criticized by Stone (1916), 16 Col. L. Rev. 443, 460, a contract of employment for five years was determinable by either party at the end of three years, and defendant was discharged thereunder at the end of three years. The court refused to enforce defendant's negative promise not to draw illustrations for rival newspapers for the remaining two years though plaintiff had fully performed. Hardship, not want of mutuality, is the only basis on which this decision may be supported.

[35] Whitwood Chem. Co. v. Hardman, [1891] 2 Ch. 416, the court saying: "Now every agreement to do a particular thing in one sense involves a negative . . . but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will."

Contracts negative in form but affirmative in fact must be distinguished, as a contract to employ for a term accompanied by a contract not to discharge during that term, as well as a contract affirmative in form but negative in fact, such as a contract of forbearance, as explained by Prof. Williston [3 Contracts, § 1448]. These must be treated according to what they are in fact, not in mere form. Thus treated, a contract of service involves no negative promise in any true legal sense, contrary to the implication of the statement above quoted from Whitwood Chem. Co. v. Hardman, *supra*. Could the employer recover damages for working for another, in the absence of an express negative promise, over and above the damages proximately arising from the breach of the affirmative contract of service? Clearly not. There would seem to be no

fact, but only because the affirmative agreement, fairly construed, forbids the act and is in substance, therefore, to that extent, a negative contract. To imply a negative from the affirmative promise so as to enforce it specifically would necessarily involve an agreement not to do anything inconsistent with performance of the contract of service, such as to play golf, to take a pleasure trip to Europe or to Florida, as well as an agreement not to engage in similar service for another, and would be equivalent to a direct enforcement of the contract by mandatory decree.

A contract to make a lease of land for mining purposes has been specifically enforced though the rent was to be paid in the form of a royalty, and the essence of the contract from the defendant-landlord's point of view was the express provision that the plaintiff should work and mine the land continuously, in good faith and in a workmanlike manner. The objection that the execution of the lease would leave the defendant without remedy other than money damages for plaintiff's failure to perform this covenant to open mines and work them during the years for which the lease would run was brushed aside. The court said that in case of breach by the plaintiff he would have ample remedy both at law and in equity.[36] He would surely

reason, therefore, why a negative should be implied by equity in order to find a means of enforcing the affirmative. The only cases in which a negative may be implied are where the act in violation thereof is in itself a violation of the affirmative, which necessarily means that the affirmative promise is, to that extent at least, affirmative in form but negative in fact. Thus a sale of the good will of a business involves an implied negative promise not to solicit the vendor's former customers. [3 Williston, Contracts, 2883, n. 66]. This would be taking back what he had transferred by his affirmative contract of sale. Pomeroy (1918), [1 Ill. Law Bull. 122], asserts that in cases or personal contract other than that of employment no distinction exists between express and implied prohibition, the prohibition being implied and enforced if the remedy of damages is inadequate. The cases cited, such as Metropolitan Elec. Supply Co. v. Ginder, *supra* note 29, involve really negative promises though affirmative in form, the acts enjoined being direct breaches of the contract. In the absence of an express negative an injunction against an act inconsistent with the affirmative should never be given except as the act is in itself a breach of the affirmative.

36 Zelleken v. Lynch, 80 Kan. 746, 104 Pac. 563 (1909), noted (1910), 23 Harv. L. Rev. 295. See St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995 (1901).

have whatever remedy he expected to rely on when he made the agreement. No doubt a breach by the tenant would give the landlord the right to terminate the lease, and he would be left to recover only such royalties as had accrued from the last payment prior to such breach, and such damages as might have accrued from the failure to work the mining land during the period intervening between such failure and the recovery of the land. The lease made pursuant to the decree should reserve a right of entry and forfeiture of the lease in case of breach by the tenant. The landlord is reasonably assured of counter-performance, therefore, or its equivalent in damages. If damages will be adequate, in such case, it is difficult to see any unfairness in enforcing the contract against the landlord. He has all the security of performance by the tenant which the contract contemplated.

Co-operative marketing contracts, by which producers of a crop, such as wheat, tobacco, fruit, poultry products, or the like, in a given territory, combine to form a corporation or association for the purpose of co-operative marketing of the product, are generally enforced specifically against the individual producer, requiring him to deliver his crop to the association and not to sell elsewhere, in accordance with the terms of his promise. It is clear, of course, that in these cases as in most of the other cases discussed above, the rule of mutuality of performance as stated by Prof. Ames would not be satisfied. The defendant could not, after his enforced performance, get specific performance against the association in case of its failure to sell his crop and to pay him therefor, pursuant to the contract, which in the usual case provides for a pooling of all sales and payment *pro rata* to each member of the proceeds of sales after deducting all expenses. But in any event he could recover from the association the value of his product which he is compelled by the court to turn over to them, in case they fail to carry out their contract, and money damages is an adequate remedy for a crop.[37]

In Rust v. Conrad, 47 Mich. 449 (1882), the court refused specific performance of a similar contract to make a mining lease, based on the plaintiff's right to terminate the relation at any time. A statute resulted shortly after making such contracts enforceable specifically. Mich. Laws 1883, Act No. 73; Grummett v. Gingrass, 77 Mich. 369, 388, 143 N. W. 999 (1889). 1 Ames, Cas. Eq. 437, n. 7.

[37] Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 Pac.

Statutes in several states expressly provide for specific performance in these cases[38] — indeed the success of these co-operative enterprises turn on this right, as damages against the individual producer would be obviously inadequate—but in several cases specific performance has been given on general equitable principles without relying on a statute.[39]

The net result of the recent cases seems to be that Prof. Ames' statement of the rule of mutuality of performance must give way, and its place must be taken by the general principles of equitable action expressed by Judge Cardozo in the statement quoted in the opening paragraph of this section. Equity will grant specific performance in any case where such relief would normally be given, irrespective of the principle of mutuality, provided the defendant is not left without adequate remedy after his enforced performance in case the plaintiff should fail to perform thereafter, so that the decree "will operate without injustice or oppression." In cases of concurrent performance, by both parties after the decree, in cases of the enforcement of negative promises made dependent upon continued performance of his contract by the plaintiff, in cases of plaintiff's performance secured by condition or covenant inserted in a deed or lease

311 (1923); Tobacco Grower's Co-operative Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636 (1924). See note on Texas Farm Bureau Cotton Ass'n v. Stovall, *post* note 38, in (1923), 37 Harv. L. Rev. 145.

In Poultry Producers, etc., Inc. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922), the court refused specific performance because defendant could not maintain specific performance against the Association. Mutuality of remedy, as laid down by Fry, seems to be established in California by express provision of the Code, § 3423, subd. 5. Otherwise the court would have ordered specific performance of the negative promise not to sell to others, making the decree conditional upon continued performance by the plaintiff Association. See criticism of this case (1922), 10 Cal. L. Rev. 518. Specific performance in these cases was provided for in 1923, Cal. Civ. Code § 653.

38 Henderson, Co-operative Marketing Associations (1923), 23 Col. L. Rev. 91, containing a list of the various statutes, and some account of their somewhat varying provisions. The constitutionality of such statutes is uniformly sustained. Kansas Wheat Growers' Ass'n v. Schulte, *supra* note 37.

39 Owen County, etc., Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710 (1908); Grant County Board v. Allphin, 152 Ky. 280, 153 S. W. 417 (1913); Texas Farm Ass'n v. Stovall, 113 Tex. 273, 253 S. W. 1101 (1923); Oregon Growers' Co-operative Ass'n v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923).

which the defendant is compelled specifically to execute and deliver to the plaintiff, as well as in the co-operative marketing contracts last referred to, all that the courts insist on is that the interests of the defendant in future performance by the plaintiff be fairly and adequately protected in granting the specific performance which the inadequacy of damages makes necessary.

Furthermore, except in contracts for personal service or similar personal relation, such as that of partners, the readiness of equity to compel performance of contracts involving much detailed and long-extended performance where damages would be clearly inadequate[40] might very well cause the court to decree counter-performance by the plaintiff as well as performance by the defendant in these cases involving performance by the plaintiff continuing long after performance by the defendant. Where damages would be inadequate from the standpoint of both parties, specific performance by both should be decreed. There would seem to be no greater difficulty in decreeing the continued operation of a mine or oil well, or performance by a co-operative marketing association than in enforcing specific performance of a contract to supply electric current, water or other public service, or to operate trains by two railroad companies on the tracks of one of them for extended or indefinite periods.

A peculiar error into which some of the courts have fallen should be briefly considered. Equity will not make a vain decree, and therefore will not compel the defendant to make a lease or do other act when by his contract he will have the power to terminate the relation at his election.[41] Several cases hold, partly on the theory of mutuality of remedy, now so thoroughly discredited, and partly by confusing the case with the situation above referred to where the *defendant* may vitiate the decree by electing to terminate the relation created by the contract, that equity will not decree specific performance where the *plaintiff* has the right to end the relation which would be created by performance.[42] The weight of authority and reason is strongly

40 See *supra* § 65, notes 19–23, 25–27.

41 Hercy v. Birch, 9 Ves. 357, 32 Eng. Rep. 640 (1804); Meason v. Kaine, 63 Pa. 335 (1869); St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995 (1901).

42 Rutland Marble Co. v. Ripley, 77 U. S. (10 Wall.), 339 (1870); Rust v. Conrad, 47 Mich. 449 (1882) *supra* note 36; Sturgis v. Galindo,

opposed to these cases. Surely the decree is sought by the plaintiff to obtain the benefits of the performance which the contract calls for, not to bring those benefits to an end as soon as the decree is secured, and therefore the decree is not vain, as it would be if the unwilling defendant had the same option to terminate the relation. Therefore an option by the plaintiff tenant to terminate a lease, or of a plaintiff baseball club to terminate a contract with a skilled player, does not prevent the plaintiff from getting the specific performance which the inadequacy of damages requires.[43] The right of the plaintiff to terminate the relation on notice is part of the contract, and the fact that the defendant has no corresponding right in no way affects the plaintiff's right to recover damages or to enforce specific performance if the defendant breaks his contract. In fact, if the defendant had a similar option no decree of specific performance would be given, as the defendant could defeat it by exercising his option.

59 Cal. 28 (1881); Watford Oil, etc., Co. v. Shipman, 233 Ill. 9, 84 N. E. 53 (1908); Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696 (1908).

[43] Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526 (1914); Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902), citing Singer Sewing Machine Co. v. Union Buttonhole, etc., Co., Holmes Rep. 253; Boonton v. United Water Supply Co., 83 N. J. Eq. 536, 91 Atl. 814 (1914). In McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516 (1910), the court said (at 153): "A perfectly familiar illustration of this class of actions is the one brought by a vendor of real estate to restrain a violation by the vendee of a restrictive covenant in the deed. There is at the time no mutual obligation resting on the vendor. But the vendee for a good consideration has agreed not to do certain things and I apprehend it would not be a defense to an action to restrain his violation that the vendor might in the future do something which would terminate the obligation." See 36 Cyc. 632 (1908), 3 Ill. L. Rev. 43.

CHAPTER XV

PERFORMANCE OF CONDITIONS IN SPECIFIC PERFORMANCE CASES

§ 71. Conditions in Contract at Law. At law it is settled that all express conditions precedent to the defendants obligation under a contract must have been complied with before the plaintiff can maintain an action against him for a breach of the contract. Though no express condition requires it, the performance of any act to be done by the plaintiff under the contract prior to performance by the defendant, is an implied condition precedent to the defendant's liability, and if performance is to occur on both sides at the same time each must show himself ready, willing and able to perform as provided by the contract in order to hold the other liable for a breach. The law of implied conditions may be summed up in the rule that the plaintiff must show that he has performed everything to be done by him under the contract prior to defendant's breach, including readiness and ability to perform when performance on both sides was to be mutual and concurrent, in order to hold the defendant for a breach of the contract. If the plaintiff is himself in default prior to the defendant's breach, or if he is unable or unwilling to perform at the time fixed for such mutual performance, he cannot recover against the defendant for his breach.[1]

The doctrine of mutuality in its various forms, discussed in the preceding chapter, arises only where the plaintiff establishes a right to specific performance apart from that doctrine, and therefore before that question arises it must appear that he is not substantially in default himself, and that he is ready, willing and able to perform his part of the contract where performance is to be mutual and concurrent, before he can establish his right

[1] As to express conditions at law see 2 Williston, Contracts, 1299 *et seq.* As to performance by the plaintiff as an implied condition to liability to perform by defendant see 2 Williston, Contracts, 1560 *et seq.*

to specific performance. That right being established, absence of mutuality of remedy or of performance or both has been asserted as a reason why specific performance should not be given, though the remedy at law is undoubted, with the results in the law's development which are detailed in the foregoing chapter.

Performance by the plaintiff as required in equity before specific performance will be granted will now be considered in detail.

§ 72. **Express Conditions.** In equity as at law the plaintiff must plead and prove performance of all express conditions precedent to the defendant's liability in order to secure a decree for the specific performance of any bilateral executory contract.[2] In a leading New York case[3] defendant contracted to convey a parcel of real estate to the plaintiff, title to which was to be acquired by the defendant from a third person under a similar contract, the contract with the plaintiff providing that the defendant's promise was upon the condition that he receive title to the property on or before October 1st thereafter; if he should not, the contract should become null and void and the plaintiff's deposit should be returned. The closing of both contracts of sale was fixed for the same day, and on that day the defendant did not take title because of objections to the title made by a title company, the plaintiff, through his attorney, also refusing to take title because of these defects, but asking for a week's delay to clear them up, which the defendant refused. Two weeks later the defendant took title, the defects having been removed. The court refused specific performance against him, saying: "This provision was undoubtedly inserted in the contract for McGrath's protection. He could waive it, but he could also insist upon it. . . . The parties had made time the essence of the contract, and when it became 'null and void' by its express conditions the equitable interest that plaintiff had acquired in the property was divested."

[2] Feversham v. Watson, Freeman, Ch. 35, 22 Eng. Rep. 1042 (1677), 1 Ames, Cas. Eq. 317. For additional cases see *ibid.*, 318, note 2; 2 Williston, *op. cit. supra* note 1.

[3] Baldwin v. McGrath, 90 App. Div. 199, 85 N. Y. Supp. 735 (1904); 113 App. Div. 902 (1906), aff'd 188 N. Y. 606, 81 N. E. 1159 (1907).

A provision for renewal of a lease by the tenant upon his giving a stated notice, and upon his paying the rent and performing the covenants and provisions of the lease, is subject to the express condition precedent that such notice be given and that the rent be paid and the other provisions be substantially complied with by the time fixed for such renewal. Failure to give the notice or to perform the covenants of the lease are breaches of express conditions which result in the loss of the privilege of renewal unless they have been waived by the landlord.[4]

[4] Bastin v. Bidwell, 18 Ch. D. 238 (1881).

Even where performance of the provisions of the lease are not expressly made conditions precedent, as they were in the above case, the courts have in some cases refused specific performance if the plaintiff tenant has failed in a substantial way to perform the terms and provisions of the lease, such breaches not having been waived as conditions by the landlord. Thus in Gannett v. Albree, 103 Mass. 372 (1869), the court refused specific performance of an option to renew a lease because the tenant had been guilty of the breach of an express stipulation forbidding certain uses of the premises. The court gives no explanation of the reasons for the decision apart from the statement that the use of the house as a boarding house was a violation of the terms of the lease. Cases cited in 1 Ames, Cas. Eq. 322, n. 2, following this case, differ in that the promise broken in each case was so definitely involved in the promise sought to be specifically enforced that its performance was clearly a condition precedent to such enforcement. In Bastin v. Bidwell, *supra,* performance of the stipulations in the lease by the tenant were made express conditions precedent to the contract to renew, and that fact was the basis of the decision. The cases generally refuse to treat performance of the provisions of the lease as implied conditions precedent to such contract of renewal at law when not made express conditions. See 2 Cook, Cas. Eq. 247 n. It is clear that the same result should follow in equity, subject to the reserved power in equity to refuse relief to a bad tenant so seriously in default that justice demands the denial of the usual relief. Possibly Gannett v. Albree, *supra,* may be explained on that theory.

Where a contract of sale provides that the price is to be fixed by arbitration or by valuers, the fixing of the price in the way provided is a condition precedent which prevents enforcement of the contract if the arbitration or valuation is not made. If this is due to the plaintiff's default it is clear that he cannot have specific performance because of his breach of condition, a situation which would hardly arise as a defaulter would not sue for specific performance. The same result follows where the failure to arbitrate is due to the defendant's default in states where the old rule prevails that a contract to arbitrate will not be specifically enforced.

Of the same nature and turning on the same principles are option contracts to buy or to sell by a tenant or any other person, to be exercised within a certain time or by a certain date. Failure to exercise the option within the time limit provided is simply a failure to accept the offer, which expires at the end of the time so limited, so that the option expires and all rights thereunder come to an end.[5] An option to renew a lease must be exercised within the time provided in the option.[6] No equitable

See Davilla v. United Fruit Co., 88 N. J. Eq. 602, 103 Atl. 519 (1918), and cases therein cited and discussed, also § 64, *ante*. But where the old rule has been changed by statute, as in New York, New Jersey and several other states, and in states in which the old rule is overcome by treating the mode of determining reasonable value by arbitration as not of the essence (see § 64, *ante*), specific performance should be had, as the failure to arbitrate is part of the defendant's breach of contract, in no sense a breach of express condition by the plaintiff. The statute in New Jersey should, therefore, result in changing the rule laid down in the Davilla case cited above.

5 Ranelagh v. Melton, 2 Drew. & Sm. 278, 62 Eng. Rep. 627 (1864), 1 Ames, Cas. Eq. 319; Waterman v. Banks, 144 U. S. 394; 12 Sup. Ct. 646 (1891); Martin v. Morgan, 87 Cal. 203, 25 Pac. 350 (1890); Phipps v. Munson, 50 Conn. 267 (1882); Dikeman v. Sunday Creek Coal Co., 184 Ill. 546, 56 N. E. 864 (1900); Carter v. Phillips, 144 Mass. 100, 10 N. E. 500 (1887); Glass v. Rowe, 103 Mo. 513, 15 S. W. 334 (1891); Potts v. Whitehead, 20 N. J. Eq. 55 (1869); Kerr v. Purdy, 51 N. Y. 629 (1872). For additional cases see 1 Ames, Cas. Eq. 320, 321 n.; 36 Cyc. 711, n. 42.

6 Bastin v. Bidwell, *supra* note 4; F. B. Fountain Co. v. Stein, 97 Conn. 619, 118 Atl. 47 (1922). In the latter case, while admitting that the vendor-purchaser relation does not arise, and therefore no equitable estate exists, before the option is exercised, the court cites some authority for the proposition that a tenant in possession who has made valuable improvements under a lease with an option to renew has an equity arising out of the facts, in that "equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease," it appearing that failure to exercise the option in time was due to mere neglect, without willful or gross negligence. In commenting on this case (1923), 32 Yale L. J. 408, it is said: "In the instant case the court virtually rewrote the contract for the parties. . . . To extend that power (of renewal) in order to prevent a supposed forfeiture which the lessee would suffer, the court compelled the landlord to grant more than he ever intended to grant."

Where equity relieves from a forfeiture for breach of condition subsequent calling for money payments only or where the breach resulted from accident, fraud or mistake, re-

estate arises in the purchaser or tenant in these cases until the exercise of the option, when a contract enforceable by specific performance arises for the first time.[7] To relieve the purchaser or tenant from his supposed "forfeiture" by giving him further time in which to exercise the option would be to extend the time in which an offer might be accepted without the consent of the offerer, a proposition which is entirely indefensible.

§ 73. Performance When Time Is "of the Essence." Implied Conditions. When time is expressly made "of the essence," either in so many words or by a provision that a party's rights under the contract shall end, or be forfeited, in case he fails to perform at the time or within the time fixed by the contract, performance at or within the time so fixed is an express condition precedent to the other party's liability on his promise, and therefore the plaintiff must establish performance in strict accord therewith in order to hold the defendant either at law or in equity on an executory contract, as distinguished from a contract which has been executed in whole or in a substantial part by the plaintiff.[8] The suggestion sometimes made[9]

lief from forfeiture on equitable principles going back to the 15th century is involved. See Walsh, Property (2d Ed.), § 224. But in these cases there is no forfeiture. The tenant's estate merely comes to an end. His option gives him no equitable estate. His right to specific performance arises only on exercise of the option. The principle of equitable relief from forfeiture has no application.

7 See Ch. XVII, notes 7 and 18 *post*.

8 Parkin v. Thorold, 16 Beav. 59, 51 Eng. Rep. 698 (1852); Cleary v. Folger, 84 Cal. 316, 24 Pac. 280 (1890); Smith v. Post, 167 Cal. 69, 138 Pac. 705 (1914); Turn Verein Eiche v. Kionka, 255 Ill. 392, 99 N. E. 684 (1912); Auxier v. Taylor, 102 Ia. 673, 72 N. W. 291 (1897); Garcin v. Penn. Furnace Co., 186 Mass. 405, 71 N. E. 793 (1904); Hollman v. Conlon, 143 Mo. 369, 45 S. W. 275 (1898); Collins v. Delaney Co., 71 N. J. Eq. 320, 64 Atl. 107 (1906); Rugg v. Midland R. Co., 261 Pa. 453, 104 Atl. 685 (1918); and cases in notes following. See 1 Ames, Cas. Eq. 335, n.; 2 Williston, Contracts, 1632.

9 See reference in Edgerton v. Peckham, 11 Paige 352 (N. Y. 1844), to Newlands, Contract, 238 to 248, to this effect, citing English cases holding that equity will enforce specific performance in spite of an express stipulation making time of the essence, Lord Thurlow having been reported as asserting that such express stipulations would make no difference. Lord Thurlow limited this doctrine to cases where there had been partial performance to a substantial extent, so that a forfeiture would be suffered in case

that the purchaser of land, having an equitable estate as a result of his contract, will be protected in equity against forfeiture of that estate in such cases in spite of this express provision or condition, is not supported by the cases. The equitable estate or interest arising out of the vendor-purchaser relation is not protected from forfeiture where the contract is still executory on both sides, as it is of very little value or importance when no substantial part of the purchase price has been paid.[10]

Questions involving the enforcement of conditions in equity arise almost entirely in connection with contracts for the sale of land. Time is not "of the essence" in such contracts unless expressly made so by the contract, or by notice served on the party in default as hereafter explained. In the absence of express conditions, the general rules of law requiring performance of his part of the contract by the plaintiff up to the time of default by the defendant apply. These rules are created by the courts, based on the justice of requiring an exchange of performances between the parties, and the clear injustice of requiring performance of the defendant when the plaintiff is substantially in default.[11] But substantial performance by the plaintiff is all that the law requires. If the substantial purpose of the contract is accomplished by the plaintiff's performance he may hold the defendant on his promise in spite of failure to perform in time, where time is not of the essence, or failure in other details. An allowance in favor of the defendant for these deficiencies in the plaintiff's performance meets the situation.[12]

equity refused to act. Seton v. Slade, 7 Ves. 265, 32 Eng. Rep. 108 (1802). Lord Eldon said: "But there is another circumstance—the effect of a contract of purchase is very different at law and in equity; at law the estate remains the estate of the vendor, and the money that of the vendee. It is not so here; the estate is the real estate of the vendee; it descends to his heirs; it is devisable by his will; therefore I do not take a full view of the subject, upon the question of time unless that is taken into consideration."

These statements apply, and were probably intended to apply, to cases where the purchaser's equitable interest had become valuable through substantial payments, with or without possession. See *post* § 74.

10 See *post* § 74; also *supra* note 9.

11 See 2 Williston, Contracts, 1560, *et seq.*

12 Any extended discussion of implied conditions at law is not attempted in this work. Substantial performance by the plaintiff, though he is in default in point of time, or in respect to other details of per-

Therefore either party to a contract to convey land may have specific performance, time being not expressly of the essence, though at the time fixed for closing he was not ready to close, whether because of defects in the vendor's title, or delay suffered by the vendee in securing funds. If within a reasonable time thereafter the difficulty is removed in either case, the party in default may enforce specific performance in spite of the delay, an adjustment being made in the payment of the purchase price to compensate the other party for the delay. As land does not fluctuate in value in a short period of time, the purchaser is not hurt by the delay, and the vendor may be recompensed because of a like delay on the vendee's part by payment of interest on the purchase price. In other words, the delayed performance, if not for an unreasonable time, is substantial performance as explained above.[13]

formance which may be compensated by a deduction from his recovery, gives him the right to enforce the contract at law subject to such deductions as will make good his failure to fully perform. As performance by him is not expressly made a condition to the promise of the defendant, but is made conditional by operation of law in order to do justice, it is not a matter of modifying an express contract, but of modifying a rule created by the courts and therefore subject to such modification as justice demands. See 2 Williston, Contracts, § 842, "substantial performance," and cases cited, also §§ 841, 843, and other sections therein referred to.

13 Parkin v. Thorold, *supra* note 8; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258 (1895); McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190 (1895); Barsolou v. Newton, 63 Cal. 223 (1883); Pritchard v. Todd, 38 Conn. 413 (1871); Hanna v. Ratekin, 43 Ill. 462 (1867); Mansfield v. Wills, 221 Mass. 75, 108 N. E. 901 (1915); King v. Connors, 222 Mass. 261, 110 N. E. 289 (1915); Libby v. Parry, 98 Minn. 366, 108 N. W. 299 (1906); Sharp v. Trimmer, 24 N. J. Eq. 422 (1874); Dynan v. McCulloch, 46 N. J. Eq. 11, 18 Atl. 822 (1889); Baumeister v. Demuth, 84 App. Div. 394, 82 N. Y. Supp. 831, aff'd, 178 N. Y. 630, 71 N. E. 1128 (1904); Day v. Hunt, 112 N. Y. 191, 19 N. E. 414 (1889); White v. Patterson, 139 Pa. 429, 21 Atl. 360 (1891). See list of cases cited 1 Ames, Cas. Eq. 330, 331, n., and 2 Williston, Contracts 1630, n. 86 and n. 87.

Under the English practice a considerable time is allowed as reasonable before delay in performance is treated as such a breach of condition as to preclude the plaintiff from specific performance. See Stickney v. Keeble, [1915] A. C. 386; Crawford v. Toogood, 13 Ch. D. 153 (1879), 2 Cook, Cas. Eq. 262–266. In the United States a reasonable time for performance beyond the date fixed by the contract is decidedly shorter. In Mansfield

Where performance on time is made an express condition by a provision that time is of the essence, but the condition has been waived by the promisee, and where time is not of the essence, notice may be served on the party in default by the other party requiring performance by a stated time, which must be a reasonable time, the effect of which is to make performance by that time "of the essence" as an express condition precedent, so that failure to perform by the time fixed in the notice will relieve the party giving the notice from performing his contract.[14]

It seems clear that time cannot be made of the essence by a notice served before performance is to take place, since that would amount to an important modification of the contract by one party without the consent of the other.[15]

v. Wiles, *supra*, tender a month later was held good. The practical method of limiting the party in default to a stated time is by serving him with notice to perform by a stated date, making time of the essence, which must be within a reasonable time. See cases *post* note 14. As to laches see *post* § 102.

14 In Stickney v. Keeble, *supra* note 13, a notice of 14 days to the vendors was held sufficient, it being the third notice of the kind, the total elapsed time from the contract date to the date fixed by the final notice being over four months. In Crawford v. Toogood, *supra* note 13, notice of five weeks was held to be too short a time within which to do what would be required to complete the examination of the title and the preparation and execution of the necessary papers in that case. Notice of 3 days was held sufficient in Schmidt v. Reed, 132 N. Y. 108, 30 N. E. 373 (1892). What will be a reasonable time within which performance should be completed will depend on the facts of each case. See cases cited 1 Ames, Cas. Eq. 333, n. 1, and 2 Williston, Contracts 1633, n. 93.

In Taylor v. Goelet, 208 N. Y. 253, 101 N. E. 867 (1913), the defendant contracted to erect a large building on defendant's land and to lease it to the plaintiff. Time was not made of the essence. The court said that to make time of the essence a notice to defendant was required, demanding performance within a stated time, which must be a reasonable time, just as time may again be made of the essence, when an express condition to that effect has been waived, by a similar notice fixing a later time for performance. As no such notice had been given the court held that the plaintiff could not rescind because of failure of the defendant to build in time pursuant to the contract. In default of such notice the time in which such enforcement will be allowed is limited by the principle of laches. See *post* § 102.

15 The cases cited or referred to in the preceding note are nearly all cases in which the notice was served after breach and they turn on the principle above stated. In Schmidt

In many cases strict performance as to time is enforced without an express stipulation or condition where it appears that time is a matter of substantial importance, so that performance after the time specified will not amount to substantial performance by the plaintiff. Commercial contracts for the purchase and sale of commodities of fluctuating value are of this kind. Time is of the essence because delay may cause serious damage to the other party.[16] Even in cases of contracts to sell land, if the land is of fluctuating value, or if in the particular case the land is needed for a special purpose by the time fixed in the contract, time will be of the essence and strict performance by the plaintiff will be required.[17]

v. Reed, *supra* note 14, plaintiff gave notice 3 days before the date for closing that they would insist on the removal of an objection to the title by an extension of a mortgage, subject to which as so extended title was to be taken, by the date of closing. Eight days after the closing date the extension was secured by the defendant, and he tendered it with a deed and counterclaimed for specific performance. The appellate court hesitated in affirming a judgment for the plaintiff, and did so because the defendant had not announced his purpose of getting the extension after his default, and in the meantime the plaintiff had purchased elsewhere. It is clear that the notice before breach could not have made time of the essence without modifying the contract. The case is a doubtful one, to be supported, if at all, only because of the subsequent purchase by the plaintiff elsewhere coupled with the defendant's silence. See, also, Asia v. Hiser, 38 Fla. 71, 20 So. 796 (1896); Ditto v. Harding, 73 Ill. 117 (1874).

16 Norrington v. Wright, 115 U. S. 188–203, 6 Sup. Ct. 12 (1885); Cornell Bros. Co. v. Diederichsen, 213 Fed. 737 (1914); Bamberger Bros. v. Burrows, 145 Iowa 441, 124 N. W. 333 (1910); Denton v. McInnis, 85 Mo. App. 542 (1900); Wilson v. Empire Dairy Salt Co., 50 App. Div. 114, 63 N. Y. Supp. 565 (1900).

17 In Tilley v. Thomas, L. R. 3 Ch. App. 61 (1867), 1 Ames, Cas. Eq. 336, a contract to sell a leasehold house needed by the purchaser by the date fixed as his residence, having sold the house in which he was living, was refused specific enforcement because of delay by the vendor. Mining and oil property is obviously speculative, and performance must be substantially at the time agreed. Huxham v. Llewellyn, 28 L. T. Rep. 577 (1873); Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646 (1892); Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363 (1912). Sales of property with a going business, with the practical need of taking over the business promptly, not only because of fluctuations in values but because of the trouble and responsibility involved in management after the date agreed upon, are also cases of this kind. Carter v. Phillips, 144 Mass. 100, 10 N. E. 500 (1887); Clayton

We have seen that in many states the vendor has in effect a right to specific performance at law of contracts to sell personal property in his election to hold the goods for the vendee and to recover the full price, or to sell the goods and to recover the difference between the contract price and what the goods bring on such sale.[18] This developed originally in cases of goods to be manufactured on special order, when the vendor would otherwise be left with goods on his hands of a special sort for which there might be no ready market. The Uniform Sales Act limits this right of the vendor to recover the full price to cases where the goods under contract may not be readily marketable.[19] In these cases time is held to be not of the essence for similar reasons. The seller, in case of default by the buyer, would be left with special goods on his hands for which he would have no ready market in case of failure to deliver on time. Delivery within a reasonable time thereafter, with a proper deduction from the price because of the delay, is the rule in such cases.[20] Building contracts are subject to the same rules as contracts for the sale of land, time not being of the essence unless made so by express provision or by notice to complete within a stated time served on the defaulting contractor.[21] As such contracts are enforced at law generally, damages being an adequate remedy, the question of substantial performance rarely arises in equity in these cases.

v. Green, L. R. 3 C. P. 511 (1868); Weston v. Savage, 10 Ch. D. 736 (1879); Kentucky Distilleries Co. v. Warwick Co., 109 Fed. 280 (1901), [two thirds in value of contract was whiskey sold with distillery, time of essence because of fluctuating value of the whiskey]. For other cases of lands of fluctuating value, time held to be of the essence, see Myers v. Teague, 62 Fed. 654 (1894); Hawley v. Jelly, 25 Mich. 94 (1872); King v. Ruckman, 20 N. J. Eq. 316 (1869). Patents: Telegraphone Corp. v. Canadian, etc., Co., 103 Me. 444, 69 Atl. 757 (1908). Fluctuating stocks or bonds: Lewis v. Lord Lechmere, 10 Mod. 503, 88 Eng. Rep. 828 (1720); Howell's Estate, 224 Pa. 415, 73 Atl. 445 (1909).

18 See § 60, *ante*.

19 *Ibid.*

20 Beck & Pauli Lithographing Co. v. Colorado, etc., Co., 52 Fed. 700 (1892); Central, etc., Engraving Co. v. Moore, 75 Wis. 170, 43 N. W. 1124 (1889); Goddard v. Binney, 115 Mass. 450 (1874).

21 As an illustration see Taylor v. Goelet, 208 N. Y. 253, 101 N. E. 867 (1913), *supra* note 14. See 7 Williston, Contracts, § 849.

As most cases of specific performance in equity are brought to enforce contracts for the sale of land there is not much authority in equity establishing the principle of substantial performance in other cases. But the equitable rule in the land cases has been an efficient cause for the change in the rule at law in all cases where time is not expressly of the essence, or is not made of the essence by the attendant circumstances, fluctuating value of the property, or other reasons, as explained above. The Judicature Act of 1873 in England and the codes in the thirty code states and territories of the United States make certain this result, though there is little doubt that the equitable rule would have been established at law without the aid of statute, as in the non-code states there is no doubt that this rule of equity has been adopted generally as the rule at law today.[22] The merger of law and equity under the English and American codes necessarily eliminates a rule at law in conflict with the prevailing rule in equity.[23] It is clear, therefore, that contracts which will be specifically enforced are subject to the same rule of substantial performance both at law and in equity, not only as to time of performance but also as to actual performance of the contract in detail, as in building contracts, the contractor being entitled to enforce his contract, at law or in equity as the case may be, if the purpose of the contract has in the main been accomplished, though his performance may be lacking in details which may be adjusted by deductions or otherwise in the judgment.[24] In cases where equity has no jurisdiction because the remedy of damages is adequate the codes do not apply because they merely bring law and equity together without changing the law applying to law cases where equity has no jurisdiction.[25] Nevertheless the equitable rule has been received into the law almost universally in all these cases,

22 See cases in preceding notes where time was not expressly of the essence. The rule of substantial performance was, indeed, developed quite independently of equity in the enforcement of contracts at law where performance by the plaintiff was not an express condition precedent to the defendant's liability on his promise. See text and cases cited, *supra* notes 11 and 12. There is no doubt that permitting a delayed performance is simply an instance of the rule of substantial performance.

23 See Chap. IV, *ante*.

24 See *supra* note 21.

25 See Chap. IV, *ante*.

in code as well as in non-code states, without the operation of any statute.[26]

§ 74. Time of the Essence in Partly Executed Contracts for Land. Where the contract is executory or substantially executory we have seen in the preceding section that an express condition precedent making time of the essence must be complied with. If the vendee defaults at the time fixed for closing the title he not only loses the right to specific performance, but he is liable in damages for the breach. Payment of a deposit on signing the contract is not such part performance as will create an equity in his favor. If the contract provides that the vendor shall retain such payment as liquidated damages the agreement will be enforced unless it appears that the amount is so disproportionate to the actual damages sustained as to amount to a penalty. In that event the ancient principle of equity that a penalty will not be enforced, later adopted as the

[26] In England the Judicature Act of 1873, § 25, (36 & 37 Vict. c. 66, § 25), provides that the rule in equity shall apply at law in construing provisions in contracts as to time, and the English Sales of Goods Act of 1893, § 10 (1), [56 & 57 Vict. c. 71, § 10 (1)], provides that stipulations as to time of payment, in the absence of intent to the contrary, are not to be treated as of the essence in contracts for the sale of goods; whether other stipulations of time shall be of the essence depends on the terms of the contract. See statutes of Oklahoma, North Dakota and South Dakota, cited 2 Williston, Contracts, 1636, n. 4, providing that in the absence of expressed intent, time shall not be of the essence. It would seem that in the cases discussed above where time is of the essence by clear implication, as in commercial transactions and sales of land or goods of fluctuating value generally, time would still be of the essence under these statutes, the intent being clear though not expressed in so many words. See Reuter v. Sala, 4 C. P. D. 239, 249 (1878), Cotton, L. J., quoted in 2 Williston, Contracts, 1636, n. 5.

The statement by the court in P. J. Carlin Const. Co. v. Guerini Stone Co., 241 Fed. 545, 551 (1917), that the common law rule has been "largely modified" by the equitable rule, is fully justified. In view of the development at law of the rule of substantial performance (see *supra* note 21), and that delayed performance, recognized as sufficient to permit enforcement of the defendant's promise, is simply a case of substantial performance; that except in the very early cases time has not been of the essence in real estate contracts at law as in equity, it is clear that no substantial difference on this point exists as between law and equity quite apart from codes or other statutes.

rule at law,[27] comes into effect and the purchaser may, under the better considered cases, recover back his deposit less the actual damages sustained by the vendor.[28] Of course the vendor may, at his election, enforce the contract against the vendee, waiving his breach, the usual case of specific performance by a vendor against his vendee, instances of which are such actions dis-

[27] For an account of the development in equity of the rule that penalties of bonds could be enforced only to the extent of the actual debt or damages, not for the penal sum, see Spence, Equity, 630; 1 Eq. Cas. Abr. 91. The Statutes [8 & 9 Wm. III, C. II, § 8 (1697), and 4 Anne, 16, §§ 12, 13 (1705)], provided for recovery on bonds of only the actual damages, making the rule the same at law as in equity. Later cases extended this rule at law as in equity to all actions on contracts. Astley v. Weldon, 2 Bos. & P. 346, 126 Eng. Rep. 1318 (1801), the modern rule being established that a penalty will not be enforced, though a provision for liquidated damages not involving a penalty will be, the question in such cases being whether the agreement actually involves a penalty or is rather a reasonable agreement to fix the damages at a liquidated sum, the form of the stipulation not being conclusive. See 2 Williston, Contracts, §§ 775–779, and cases cited; Lloyd, Penalties and Forfeitures (1915), 29 Harv. L. Rev. 117.

[28] A deposit is not forfeited even though there be an express agreement to that effect if the amount so far exceeds the damages that a penalty is actually involved, and only his actual damages may be retained by the vendor. See Caesar v. Rubinson, 174 N. Y. 492, 67 N. E. 58 (1903), [deposit by a tenant to secure rent greatly exceeding rent due], and other cases cited, 2 Williston, Contracts, 1512, n. 14. In most cases the purchaser's default entitles the vendor to damages approximating the amount of the deposit, and an express agreement that it be forfeited in case of his default will be enforced as a stipulation for liquidated damages, as in Garcin v. Pennsylvania Furnace Co., *supra* note 8, but in that and other cases in which the agreement is enforced as valid it is recognized that if a penalty is involved only the vendor's actual damages may be retained by him. On the other hand there is authority for the proposition that a defaulting purchaser cannot recover any part of his payment, as in Lawrence v. Miller, 86 N. Y. 131 (1881), the court holding that the defaulting purchaser could not recover any part of his payment of $2000, though exceeding the vendor's damages. Such cases overlook the principle of relief from penalties, established in equity and now generally established at law. See Kleiberg v. Ratett, 252 N. Y. 236, 169 N. E. 289 (1929), in which the purchaser's action for a return of the deposit was dismissed without discussion of the relation of the deposit to damages, though the court also denied the vendor's counterclaim for specific performance on the ground of hardship. See § 104, note 48, and text *et seq., post.*

cussed and cited in the chapter preceding on mutuality. If the vendor is in substantial default the vendee has the same right to waive the breach and enforce specific performance with compensation, discussed hereafter,[29] or he may rescind the contract and recover his deposit with interest, together with his damages, generally limited to the cost of the search and other sums of which he is out of pocket when failure to perform is due to a defect of title without bad faith,[30] but in a majority of the states including damages for the loss of the contract as well.[31]

A radically different situation arises where the purchaser takes possession and pays substantial sums on account of the purchase price, the deed to be delivered on making a final payment of the money, over and above mortgages, to be paid for the prop-

29 See § 76, *post*.

30 Flureau v. Thornhill, 2 Bla. W. 1078, 96 Eng. Rep. 635 (1776), [because the contract is based on the condition that the vendor has good title]; Bain v. Fothergill, L. R. 7 H. L. 158 (1874), [applying same rule though vendor knew of defective title]. In the United States full damages are recovered against the vendor if he acted in bad faith, knowing of the defect in title. Northridge v. Moore, 118 N. Y. 419, 23 N. E. 570 (1890); Donner v. Redenbough, 61 Iowa 269, 16 N. W. 127 (1883); Horner v. Beasley, 105 Md. 193, 65 Atl. 820 (1907). The English rule is followed in New Jersey, with some uncertainty in the matter of the vendor's good faith. Brown v. Honiss, 70 N. J. L. 260, 58 Atl. 86 (1903), 74 N. J. L. 501, 68 Atl. 150 (1907); Gerbert v. Trustees, etc., 59 N. J. L. 160, 35 Atl. 1121 (1896); Drake v. Baker, 34 N. J. L. 358 (1871). So also in Pennsylvania, Rineer v. Collins, 156 Pa. 342, 27 Atl. 28 (1893); Thompson v. Sheplar, 72 Pa. 160 (1872). If the purchaser knew of the lack or defect of title, his right is simply to be put back in *statu quo*, viz., to rescind. See *post* note 81.

31 Full damages for the loss of the contract, as in personal property cases, are recovered in England and the United States where the vendor is guilty of a wilful breach without the excuse of defective title. Laird v. Pim, 7 M. & W. 474, 151 Eng. Rep. 852 (1841); Waters v. Pearson, 163 Iowa 391, 144 N. W. 1026 (1914); Bensinger v. Erhardt, 74 App. Div. 169, 77 N. Y. Supp. 577 (1902). The rule in the majority of states is that full damages may be recovered for any breach by the vendor, whether arising from defect of title or not. Harten v. Löffler, 212 U. S. 397, 29 Sup. Ct. 351 (1909); Jamulewyez v. Quagliano, 88 Conn. 60, 89 Atl. 897 (1914); Dady v. Condit, 209 Ill. 488, 70 N. E. 1088 (1904); Boyden v. Hill, 198 Mass. 477, 85 N. E. 413 (1908). See § 76, note 81 *et seq.* for relation of this rule to specific performance with compensation. For details and exceptions made in the application of these rules see 3 Williston, Contracts, § 1399.

erty. If he spends money in improving the property after taking possession, changing his position by so doing, his equitable right to the property is still further strengthened. If time is not expressly of the essence no difficulty arises in case of failure to meet further payments. Delayed performance with compensation in the form of interest will be substantial performance, in accord with the cases cited and discussed in the preceding section. But if the contract expressly provides that time shall be of the essence, coupled with the usual provision that on default in any payment the purchaser shall forfeit all payments theretofore made and all rights under the contract, a question of real difficulty is presented. Delayed performance would be in violation of an express condition precedent and enforcement of the contract by the purchaser on the basis of delayed performance over the objection of the vendor would be in violation of the contract. At law the purchaser is in the position of a party to a contract who has lost the right to performance by the vendor because of his breach of an express condition precedent. If payments made by him are so large that the agreement to forfeit them as liquidated damages amounts to a penalty, he may, according to the better considered cases, recover the amount thereof after the vendor's actual damages have been deducted, under the rule of damages discussed above in considering the corresponding situation when the contract is executory on both sides,[32] but he will have no right to recover for the improvements which he has made. How can equity help him?

It is now definitely settled in nearly all jurisdictions that a valid contract to sell land enforceable by specific performance by either party against the other results in a *quasi* trust relation, the vendor holding the legal title as trustee for the purchaser who becomes owner of the property in equity, the vendor holding the legal title as security for payment of the purchase price. Therefore the land passes, subject to the vendor's lien, to the heirs of the purchaser, not to the heirs of the vendor, on the death of the purchaser prior to the closing of title, and the right to the purchase money passes to the estate of the deceased vendor. The widow of the purchaser is entitled to dower in her

[32] See *supra* note 28 and *post* note 45, Steedman v. Drinkle, [1916] 1 A. C. 275, the court holding that the purchaser should have relief in equity from forfeiture of payments made.

husband's equitable estate. Loss through destruction by fire prior to closing of title falls on the vendee, not on the vendor. The details of these and other various incidents of the vendor-purchaser relation are developed in a later chapter.[33] There can be no doubt that this estate arises in the purchaser, so that the incidents above referred to arise, though performance or readiness to perform by each party is an implied condition precedent to liability of the other party. An option does not give rise to the relation because a contract of sale does not arise until the exercise of the option,[34] but where a contract exists which may be specifically enforced, and the purchaser assigns his rights under the contract to a third person, the assignee becomes owner of the equitable estate of the original purchaser, the vendor-purchaser relation existing, therefore, in spite of the fact that the vendor cannot maintain specific performance against the assignee until the assignee has elected definitely to exercise his option of enforcing the contract, as by starting an action to enforce the contract or by tendering and demanding performance at the time fixed for closing or within a reasonable time thereafter.[35]

If the vendor has no title, making specific performance impossible, the vendor-purchaser relation does not exist, so that none of the results of that relation, referred to above, would arise prior to acquisition of the title by the vendor.[36]

Where the express condition precedent is a collateral event, not involving counter-performance by the vendee, such as the acquisition of title from a third person prior to the time fixed for the closing, as in Baldwin v. McGrath,[37] the purchaser has no right to the land either at law or in equity until the condition has happened, the situation being essentially the same as in the option contract cases above referred to, and therefore the vendor-purchaser relation does not exist. The purchaser has only a chance of acquiring an interest in the property. But where the condition involves the time or other detail of performance by the purchaser it may fairly be regarded as intended only as security for the purchaser's performance. That these stipulations are express conditions precedent to the vendor's

33 See Chap. XVII *post.*

34 See Chap. XVII, notes 7 and 18, *post.*

35 See § 89, *post.*

36 See § 86, note 9, *post.*

37 *Supra* note 3.

promise to convey at law cannot be fairly disputed. But because the condition is regarded in equity as a kind of security for the purchaser's performance they are treated as conditions subsequent, the purchaser's equitable estate arising subject to forfeiture by breach of the stipulation as to time.[38] Equity intervenes to prevent this forfeiture in nearly all jurisdictions for exactly the same reasons that cause equity to relieve a mortgagor or purchaser of an estate upon condition from forfeiture at law for breach of a condition involving only delay in paying money.[39] Payment within a reasonable time with interest added because of the delay gives the vendor substantially what the contract calls for, just as a similar payment to a mortgagee or a delayed payment of rent or taxes by a tenant after breach of condition in failing to make such payment on time is substantial performance relieving the mortgagor or tenant from the forfeiture at law.[40]

It seems clear, therefore, that the vendor-purchaser relation arises in spite of the provisions making time of the essence and providing for the forfeiture of the purchaser's rights in case of failure to pay any instalment punctually. How far and under what circumstances will equity relieve the purchaser from the forfeiture which results from the literal enforcement of this provision at law?

It is clear that where the contract is executory or substantially so on both sides the forfeiture of the equitable estate by the purchaser through failure to perform in time when time is of the essence does not call for equitable action, and specific per-

38 Dean Pound seems to regard the strict enforcement in California and Kansas of such forfeitures, under provisions making time of the essence, as the normal result of treating them as conditions precedent, clearly implying that the general rule prevailing in other states results from treating them as conditions subsequent. Progress of the Law (1920), 33 Harv. L. Rev. 951, 952, 824. But surely performance at the time fixed by the contract is made a condition precedent to the vendor's promise by the stipulation that time be of the essence. What at law, in contract, are unquestionably conditions precedent, become in equity conditions subsequent in that their enforcement at law will destroy the equitable interest of the purchaser. Therefore equity intervenes by specific performance to prevent such forfeitures in direct and obvious violation of the contract at law. The vendor-purchaser relation exists, therefore, in spite of this kind of condition precedent at law.

39 See *post* note 44.

40 See *post* note 44.

formance will not be enforced in his favor,[41] though the vendor in enforcing his claim to damages will be limited to his actual damages where the amount of the purchaser's deposit greatly exceeds such damages, and a stipulation that the deposit shall be forfeited as liquidated damages will not be enforced if in fact the provision involves a penalty, as explained above.[42]

Where the purchaser has paid a considerable part of the purchase price in instalments and has taken possession, the usual situation not falling in the group of cases discussed in the preceding paragraph, it is settled law generally in the United States that equity will not enforce the condition making time of the essence, but will give the purchaser specific performance after breach on the original or adjourned date of closing if he is ready to perform and tenders performance within a reasonable time thereafter, treating the condition as a provision for the purpose of securing performance, the vendor getting full compensation for the delay in the form of interest on the purchase price, the court refusing to enforce the forfeiture of the purchaser's equitable estate which would result at law.[43] That

41 See § 73, also note 36, *supra*.

42 See *supra* notes 28 and 32.

43 Vernon v. Stephens, 2 P. Wms. 66, 24 Eng. Rep. 642 (1722); Edgerton v. Peckham, 11 Paige 352 (N. Y. 1844); Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498 (1890); Butler v. Colson, 99 Ark. 340, 138 S. W. 467 (1911); Steele v. Branch, 40 Cal. 3 (1870), [the court regarding the provision that on purchaser's failure to comply with the terms of the contract he should forfeit all rights and payments as in the nature of a penalty to induce prompt performance]; Jones v. Robbins, 29 Me. 351 (1849); Barnard v. Lee, 97 Mass. 92 (1867); Richmond v. Robinson, 12 Mich. 193 (1864), [the court saying: "Nor will it (equity), by any stipulation of the parties, be ousted of its jurisdiction, or refuse to relieve against the exaction of the pound of flesh, although the parties have, in express terms, stipulated for it."]; O'Fallon v. Kennerly, 45 Mo. 124 (1869); Hall v. De la Plaine, 5 Wis. 206 (1856). See § 91, *post*, treating of the vendor-purchaser relation, the protection of the vendor by foreclosing the rights of the purchaser, whether by sale or by strict foreclosure, definitely recognizing the vendor-purchaser relation in spite of stipulations making time of the essence.

In Missouri, etc., R. Co. v. Brickley, 21 Kan. 275 (1878), though the court expressly recognized the existence of an equitable estate or interest in the purchaser, "As his payments increase, his equitable interest increases. . . . The vendor is a trustee of the legal title for the vendee to the extent of his payment"; nevertheless gave literal effect to the stipulation that time was of the essence, and specific performance was denied. The same

this position is sound and just, and is in accord with the entire history of equitable relief against forfeitures where the breach causing the forfeiture is mere delay in paying money easily compensated by awarding interest, is too clear for argument.[44] The later English cases, losing sight of the purchaser's equitable estate and its forfeiture by enforcing the contract at law according to its terms, hold that specific performance cannot be had because of the breach of an express condition precedent, but the stipulation providing for forfeiture of payments made by the purchaser prior to a breach by him are treated as a penalty "against which relief should be given on proper terms."[45] Thus they apply the doctrine of equitable relief against penalties masquerading as stipulations for liquidated damages, but fail even to consider the equally well-settled doc-

position was maintained in Pickens v. Campbell, 104 Kan. 425, 179 Pac. 343 (1919), and in Fresno Irreg. Farms Co. v. Canupis, 27 Cal. App. 859, 178 Pac. 300 (1918), with references to California's conflicting cases on this point. See N. Dakota Rev. Code, 1905, §§ 7494–7497, providing for notice of 30 days by vendor to vendee to terminate contract after breach, during which time vendor may perform contract. See Minn. Rev. L. 1905, § 4442, Gen. St. 1923, § 9576, to same effect.

[44] See § 4, *ante*, as to the history of relief in equity against forfeiture; also § 24, *ante*, as to equitable relief in mortgage cases. See Walsh, Property (2d Ed.), § 224, as to equitable relief against forfeitures for breach of conditions in conveyances or devises of land. The equitable interest of the purchaser being admitted, there is no reason why forfeiture at law of that interest should be permitted for technical delay in money payments doing no harm not covered by an allowance of interest any more than the legal interests subject to forfeiture in the cases of mortgages and estates upon condition above referred to. In all these cases equity interposes in direct violation of the legal right for perfectly valid reasons.

[45] Steedman v. Drinkle, [1916] 1 A. C. 275. In Kilmer v. British Columbia Orchard Lands, Inc., [1913] A. C. 319, the court granted specific performance in spite of express provisions for punctual payments and forfeiture, etc., for failure to pay any instalment on time, putting it on the ground of relieving the purchaser from a forfeiture, citing Dagenham Dock Case, L. R. 8 Ch. App. 1022 (1873). In Steedman v. Drinkle the court distinguished the Kilmer case because of an extension of time granted the purchaser which waived the condition that time should be of the essence, though in the Kilmer case that point was not discussed in the opinion. The earlier English cases are *contra* to Steedman v. Drinkle. Vernon v. Stephens, *supra* note 39; Dragenham Dock Case, *supra*, Cornwall v. Hanson, [1899] 2 Ch. 298, 304; 1 Ames, Cas. Eq. 338, 339.

trine of equitable relief against forfeiture of property rights, established in cases of mortgages and estates in fee upon condition, though turning on the same fundamental principles as relief from penalties.

In most of the cases last referred to the purchaser had taken possession under an instalment contract, and in many of them he had further created equities in his favor by making improvements. It seems settled that substantial payments and the taking of possession establish an equitable estate of sufficient importance to justify specific performance in favor of the purchaser in order to prevent its forfeiture. Will mere payment by the purchaser of a large part of the purchase price, without the taking of possession by him, give him a right to specific performance as against a stipulation that time shall be of the essence and that such prior payments shall be forfeited in case of breach by him? If he acquiesces in the vendor's revocation of the contract on his breach, can he recover the amount he has paid less the vendor's damages?

It seems clear that the notion that possession gives the purchaser an equitable interest which he would not have otherwise is not based on any valid reason.[46] Where the question is risk of loss as between vendor and purchaser of land it is held definitely that possession by the purchaser is not necessary to the vendor-purchaser relation.[47] The same is true where the purchaser dies and his equitable estate passes to his heirs, and in other cases involving the vendor-purchaser relation. It is clear, therefore, that equity will enforce specific performance in spite of the purchaser's default where time is of the essence if payments made are sufficient in amount to make his equitable interest of sufficient importance to justify intervention by

[46] Several of the cases above cited gave the purchaser relief though possession had not passed. See discussion of this point by Dean Pound (1920), 33 Harv. L. Rev. 826, n. 68. The suggestion that the equivalent of a mortgage relation arises from part payment and change of possession (See 2 Williston, Contracts, 1515), is merely another way of expressing the vendor-purchaser relation. See § 91, *post.*

[47] Amundson v. Severson, 41 S. D. 377, 170 N. W. 633 (1919); Mandru v. Humphreys, 83 W. Va. 307, 98 S. E. 259 (1919). See cases on this point cited, § 96, *post,* also the different situations arising where the vendor-purchaser relation exists, discussed in Chap. XVII, *post,* it appearing that in none of them is transfer of possession to the purchaser essential to the relation.

equity in order to preserve it from forfeiture at law. Possession, particularly when the purchaser has changed his position by making improvements, will make his equitable claim to relief from forfeiture much more certain, but such facts are by no means essential. The mortgage theory of the vendor-purchaser relation will be examined more fully in a later chapter.[48]

The right of the purchaser to claim a return of his payments less the vendor's damages, in case he elects to acquiesce in the vendor's rescission of the contract has been already discussed.[49]

§ 75. Marketable Title. In contracts for the sale of land the vendor must be able to transfer to the vendee a title free from any defect which would make it unmarketable. This is a clearly implied term of every such contract, unless the contract expressly provides for the transfer of such title as the vendor has, or a title which shall be approved by a title company, or by the purchaser's attorney, amounting in effect to the requirements of a marketable title, but fixing the judgment of the attorney or title company as the test.

Where all parties having an interest in the property which would be affected are joined as parties to the action, the court will pass upon all questions of law and fact involved in finally settling the question of title, and if the court finds the title to be good the contract will be specifically enforced against the purchaser who will get title free of all question, as the court's decree binds all persons having any interest.[50] But if persons having an interest under a claim of title hostile to the vendor are not parties to the action, the court's decree cannot affect them, and though the court may find that the vendor's title is clear, nevertheless such claimants could thereafter sue to enforce their claims against the purchaser if he should take title to the property. He will not be compelled to accept the title, therefore, if the facts are such that reasonable men might fairly differ as to whether such hostile claims are valid or not.[51]

48 See Chap. XVII, § 91, *post*.

49 See *supra* note 32, and text to which it refers.

50 Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13 (1886), citing Butts v. Andrews, 136 Mass. 221 (1883); Cornell v. Andrews, 35 N. J. Eq. 7 (1882), S. C. 36 N. J. Eq. 321 (1882); Gill v. Wells, 59 Md. 492 (1882); People v. Stock Exch., 92 N. Y. 98 (1883).

51 In Cornell v. Andrews, 35 N. J. Eq. 7 (1882), specific performance was refused because of uncer-

When the question of title is merely a question of law, if the rule of law applying is well settled in favor of the title, specific performance will be decreed, but if the question of law is doubtful, the opposing claimants not being parties and therefore not bound by the decree, specific performance must be refused, as the title is as doubtful as the question of law on which it depends. When a question of the proper construction of a deed or will is involved, if the court is doubtful about it, or if a construction adverse to the title might reasonably be made by another judge in a direct proceeding involving the point, the purchaser cannot be compelled to take the property, as the title forced on him would be doubtful and unmarketable.[52]

tainty of the vendor's title arising out of a mortgage in the chain of title conveying the property to "Joseph D. Beers, president of the North American Trust & Banking Co.," the defendant contending that this conveyed a life estate only, the word "heirs" being necessary to convey a fee at that time in New Jersey. Whether this was a mortgage to the individual or to the corporation could be determined finally only in a direct proceeding in which the persons entitled, if only a life estate passed under the mortgage, were parties to the action. The purchaser might be subjected to further litigation to test the question, and the defect in title would interfere with the sale of the property. The court quoted Parsons, Contracts (6th Ed.), 380: "The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the land." This statement is also quoted with approval in Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483 (1902), and Tillotson v. Gesner, 33 N. J. Eq. 313, 327 (1880). See long list of cases, 1 Ames, Cas. Eq. 267, 268 n.

52 In Pyrke v. Waddingham, 10 Hare 1, 68 Eng. Rep. 813 (1852), the question of title turning on the construction of a will, Turner, V. C., refused specific performance, though he thought the title good because "I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind, that other competent persons may not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation." The court also said: "If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in Moody v. Walters, 16 Ves. 283, 312, and Biscoe v. Perkins, 1 V. & B. 485, 493; and refusing to enforce it in the other, as in Blosse v. Lord Clanmorris, 3 Bligh 62, and Sloper v. Fish, 2 V. & B. 185."

Very often the objection to the title turns on a question of fact depending on parol evidence. In a leading case the court said that such a title is marketable "when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser."[53] Defects of record may be over-

See discussion of the possible curative effects of decrees where the title turns on a question of law in the opinion written by Vice-Chancellor Stevenson in Barger v. Gery, *supra*, note 51, referring to Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305 (1895), as discussing the cases on the point at length, and Fahy v. Cavanagh, 59 N. J. Eq. 278, 282, 283, 44 Atl. 154 (1900).

In Walker v. Gillman, 127 Mich. 269, 86 N. W. 830 (1901), the vendor's action for specific performance was dismissed because the defendant was held to be justified in relying upon the advice of her attorney who had experience and a fine reputation in passing on land titles. No doubt the real basis of the decision was uncertainty on the question of law involved. The advice of an attorney adverse to the title was regarded as proving it to be unmarketable in Miller v. Bronson, 26 R. I. 62, 58 Atl. 257 (1904). To same effect, the opinion of the judge below adverse to the title indicating that it was unmarketable, Collier v. McBean, L. R. 1 Ch. App. 81 (1865), "though the same measure of deference was not extended to the opinion of a conveyancing counsel of the court." Fry, Spec. Perf. (6th Ed.), 414, referring to Hamilton v. Buckmaster, L. R. 3 Eq. 323 (1866).

It should be evident that the decision as to whether the question of law is doubtful or not cannot be made to depend on what some lawyer or judge may have thought about it, though such statements or advice adverse to the title are good evidence tending to show uncertainty as to the law.

That a title is unmarketable if reasonable men might fairly differ as to the validity of the objection, see also Smith v. Hunter, 241 Ill. 514, 89 N. E. 686 (1909); Foster, etc., Co. v. Sayles, 213 Mass. 319, 100 N. E. 644 (1913); Gates v. Parmly, 93 Wis. 294, 66 N. W. 253 (1896).

[53] Barger v. Gery, *supra* note 51. In Shriver v. Shriver, 86 N. Y. 575, 584 (1881), the court said, referring to titles unmarketable because of uncertainty as to some matter of fact, a rational doubt existing: "It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed on the existence of which the vendor's title depends." To same effect, Hellreigel v. Manning, 97 N. Y. 56, 60 (1884); Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387 (1889); Chesebro v. Moers. 233 N. Y. 75, 134 N. E. 842 (1922).

come by clear and conclusive proof of title by adverse possession,[54] though in any case of reasonable doubt or uncertainty as to such title, such as the possible extension of the period of the Statute of Limitations by part payments, or the possible existence of a license or tenancy which would eliminate the adverse character of the possession, specific performance will be refused.[55]

To justify rejection of a title as unmarketable the purchaser must establish[56] a defect which is substantial in that it will actually cloud the title and interfere with the purchase of the property by men of average prudence. A mere possibility of a defect is not enough. It "must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat the title. When questions as to the validity of a title are settled beyond a reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made."[57]

54 Conley v. Finn, 171 Mass. 70, 50 N. E. 460 (1898), citing Scott v. Nixon, 3 Dru. & War. 388 (Ir. Ch. 1843); Gaines v. Bonnor, 54 L. J. Ch. 517, 1884); Ottinger v. Strasburger, 33 Hun. 466 (N. Y. 1884), *ibid.* 102 N. Y. 692 (1886); Pratt v. Eby, 67 Pa. 396–402 (1871); Gump v. Sibley, 79 Md. 165, 28 Atl. 977 (1894); Hedderly v. Johnson, 42 Minn. 443–445, 44 N. W. 527 (1890); Logan v. Bull, 78 Ky. 607 (1880). See, also Shriver v. Shriver, *supra* note 53; Folger, J., in Murray v. Harway, 56 N. Y. 337 (1874), "and it has been held that where one of the paper links of title was defective, the lapse might be supplied by parol proof of possession under color of title sufficient to establish a good adverse possession, and that such a title is enough on which to found a decree." See list of cases cited, 1 Ames, Cas. Eq. 268, n., and 2 Williston, Contracts, 1759, n. 10.

55 Sulk v. Tumulty, 77 N. J. Eq. 97, 75 Atl. 757 (1910); Shriver v. Shriver, *supra* note 53 (possibility of claimants against such possessor being under disability).

56 As to burden of proof, see Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966 (1894). The duty of the vendor to establish title by adverse possession, when he is seeking to establish a marketable title in this form, is clear. Sulk v. Tumulty, *supra* note 55.

57 Devens, J., in First African, etc., Society v. Brown, 147 Mass. 296, 298, 17 N. E. 549 (1888), quoted in Conley v. Finn, *supra* note 54. In the latter case the alleged defect arose from failure to acknowledge and record a deed dated 1859 until 1859 after the death of the grantee, and the court

The rule at law is now the same as in equity. The vendor must show a marketable title at the time of closing in order to recover damages from the purchaser for breach of the contract, and if his title is unmarketable the purchaser may recover advances on the purchase price with interest.[58] The old rule at law, that if the court finds the title good or bad the parties must abide by that finding though the title may be uncertain, and may be upset in a later direct action brought by the third party having the opposing claim[59] has given way to the correcting influence of equity in this as in many other instances.

decreed specific performance because of the presumption of law that the deed was delivered on its date, subject to rebuttal by evidence to the contrary. There was no such evidence, all the evidence being that the heirs of the grantor had never made any claim. Evidence of adverse possession for over 25 years was almost conclusive. In Barger v. Gery, *supra* note 51, title was made through foreclosure of a mortgage which had been assigned of record to one Anderson in 1874. In 1877 the mortgagee assigned the mortgage to one Mitchel, whose assignee foreclosed it without joining Anderson, though no record existed of a reassignment by Anderson to the mortgagee before the assignment to Mitchel. The court decreed specific performance holding the title marketable. The mortgagee had possession of the bond and mortgage when the assignment to Mitchel was made, and as assignment may be by delivery, the presumption is that it was reassigned by Anderson, with no evidence to the contrary and strong evidence of no claim by or through Anderson, who was proved to have known of the subsequent assignment and foreclosure. "There is no reasonable basis for any apprehension that the purchaser cannot at all times defend his title against this mortgage." See also cases cited, *supra* note 52.

[58] Jeakes v. White, 6 Ex. 873, 185 Eng. Rep. 600 (1851); Moore v. Williams, 115 N. Y. 586, 22 N. E. 233 (1889); Howe v. Coates, 97 Minn. 385, 107 N. W. 397 (1906); Foster, etc., Co. v. Sayles, *supra*, note 52; Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038 (1897). But in Meyer v. Madreperla, 68 N. J. L. 258, 53 Atl. 477 (1902), the court refused to apply the equity rule in an action by the purchaser for damages, though in equity his right to rescind and to recover his payment on the purchase price would be undoubted, a survival of the old conflict between law and equity that probably will not last long. In Newbury First Inst. for Sav. v. Puffer, 201 Mass. 41, 87 N. E. 562 (1908), Durfee, Cas. Eq. 773 n., the vendor's right to recover damages was not affected by failure in his suit for specific performance because of unmarketable title, clearly inconsistent with the doctrine generally prevailing that a decree in equity is *res adjudicata* as to the question decided in any subsequent action at law as well as in equity. See § 16, *ante*.

[59] Romilly v. James, 6 Taunt. 263, 274, 128 Eng. Rep. 1035, 1040

In England it is settled law that the purchaser may rescind the contract when he discovers, prior to the time fixed for closing, that the vendor had no title, or a defective title not easily corrected.[60] If he knew of the state of the vendor's title when the contract was made he has no such right.[61] In the United States several cases hold that the purchaser cannot be compelled to perform in such cases, basing the decision on the discredited doctrine of mutuality of remedy.[62] It has been asserted that in the United States except in these cases the doctrine is well settled that the contract will be enforced if the vendor has a good title at the time fixed for performance.[63] In California the courts have decided that the vendor has until the date of

(1815) and other cases cited, 1 Ames, Cas. Eq. 269, n.

60 Bellamy v. Debenham, [1891] 1 Ch. 412; Hoggart v. Scott, 1 Russ. & M. 293, 39 Eng. Rep. 113, Taml. 500, 48 Eng. Rep. 199 (1830); Brewer v. Broadwood, 22 Ch. D. 105 (1882). In Bellamy v. Debenham, *supra,* Lindley, L. J., suggested that the purchaser might have been liable for damages at law if the vendor was ready to convey a good title at the time fixed by the contract, and the purchaser refused to take title. Lopes, L. J., said he had very grave doubts about it. See 1 Ames, Cas. Eq. 327 n. See 2 Williston, Contracts, § 879, asserting that the prospective failure of consideration on which the purchaser relies in rescinding the contract applies equally at law as in equity.

61 Wylson v. Dunn, 34 Ch. D. 569 (1887), by Kekewich, J., at 578; St. Denis v. Higgins, 24 Ont. 230 (1893). That a defect of title easily cleared away, or not involving the essence and easily adjusted by compensation in the price, does not give this right to rescind prior to the date for closing is clear from the cases permitting specific performance in the vendor's favor with compensation, see *post* § 76, as well as by the cases permitting the clearing up of defects in title for a reasonable time after time fixed for closing where time is not of the essence. See *supra* notes 10, 11.

62 Norris v. Fox, 45 Fed. 406 (1891); Luse v. Dietz, 46 Iowa 205 (1877); Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900 (1893). See § 69, note 22, *ante.*

63 2 Cook, Cas. Eq. 311, n., citing Gibson v. Brown, 214 Ill. 330, 73 N. E. 578 (1905); Dresel v. Jordan, 104 Mass. 407 (1870), and referring to other cases cited in 36 Cyc. 718. Professor Cook points out that Ames cites no American cases supporting the opposing English rule (1 Ames, Cas. Eq. 326, n. 5) and that Pomeroy in the article in 36 Cyc. 718, n. 75, cites only three. In Gibson v. Brown, *supra,* the purchaser knew of the vendor's lack of title to 40 acres of the land involved, and the decision would be the same under the English cases. In Dresel v. Jordan the purchaser also had full knowledge of the lack of title in the executors who signed the contract to convey.

closing to acquire or perfect his title, and the purchaser cannot put him in default unless his title is defective at that time.[64] In a later case this was declared to be "a harsh rule, and should not be unduly extended," the court holding that the purchaser could recover purchase money which he had paid, it appearing that the vendor's title was defective because of a public right of way over the land which could not be readily removed.[65] The earlier California cases holding that a conveyance of the land by the vendor did not give the purchaser a right to rescind, as the vendor had until the day for closing to get back his title,[66] have been sharply limited by a later case in which the rule is laid down that such conveyance of the land is not a breach of his contract "if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee. But when his conveyance has been in disregard of those rights, under such circumstances that those rights are not protected, then this is a breach of contract and a fraud on the vendee."[67] This position is sustained generally by the cases.[68]

[64] Hanson v. Fox, 155 Cal. 106, 99 Pac. 489 (1909), Durfee, Cas. Eq. 779.

[65] Prentice v. Erskine, 164 Cal. 446, 129 Pac. 585 (1913).

[66] Joyce v. Shaffer, 97 Cal. 335, 32 Pac. 320 (1893); Shively v. Semi-Tropic Land, etc., Co., 99 Cal. 259, 33 Pac. 848 (1893); Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857 (1895).

[67] Brimmer v. Salisbury, 167 Cal. 522, 140 Pac. 30 (1914). The facts involved a clear case of sharp practice. After the plaintiff had conveyed the land to a third person he demanded payment of an instalment from defendant, and as defendant could not pay it, the plaintiff got from him a note for $500 for the surrender of plaintiff's rights under the contract, concealing the fact of the prior conveyance of the land to another. The court explained the California doctrine in the cases of lack or defect of title at the time the contract was made, as based on the supposition that the purchaser bought with his eyes open and is charged as a general rule with the duty of acquiring his own knowledge of the vendor's title, there being no fraud or fraudulent concealment. "Of the essence of the contract is the security of the vendee, in his payments, of the title which the vendor has, and if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is of course no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility, and that such a vendor has not the slightest intention of so doing."

[68] Parkside R. Co. v. McDonald, 166 Cal. 426, 137 Pac. 21 (1913);

On the whole we may fairly conclude that the prevailing rule, both in England and the United States, is that the purchaser may rescind on discovering that the vendor has no title prior to the time of closing if he had no notice, express or implied, of the vendor's lack of title, otherwise not. As a matter of fairness and good sense he should have the protection and security which his equitable interest in the property will give him, as the usual and normal result of the contract to purchase. If the vendor has no title the vendor-purchaser relation does not arise because specific performance cannot be enforced against the vendor. The purchaser may elect to enforce the contract when the vendor subsequently acquires the title, but he should not be compelled to wait for any such contingency to happen. Of course he has no right to rescind when he enters into the contract with notice of the vendor's lack of title. Defects of title of a sort which cannot be corrected or can be corrected only with difficulty come under the same rule for obvious reasons. Other defects of title give no right to rescind prior to the date of closing, and within a reasonable time thereafter if time is not of the essence. The right to rescind because of a conveyance by the vendor which amounts, under the circumstances of the case, to a breach of his prior contract to sell the same land, is clearly stated in the California case quoted from above, which expresses the general rule. The law on this matter seems to be substantially the same in England and the United States.

Fort Payne, etc., Co. v. Webster, 163 Mass. 134, 39 N. E. 786 (1895), [action on note for instalment of purchase money barred by sale of land by vendor]; James v. Burchell, 82 N. Y. 108 (1880), [Similar holding, based on special facts]; Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229 (1901), [the judgment sustaining the purchaser's right to the land as against a subsequent grantee with notice; *dictum* to the effect that the purchaser could not be compelled to pay because of the conveyance to another by the vendor]. In Michigan and Nebraska the purchaser's right to rescind in case of such conveyance by the vendor depends on whether the conveyance is subject to the purchaser's prior contract. Atkinson v. Scott, 36 Mich. 18 (1877); Kreibich v. Mertz, 119 Mich. 343, 78 N. W. 124 (1899); Hoock v. Bowman, 42 Neb. 87, 60 N. W. 391 (1894). In Meyers v. Markham, 90 Minn. 230, 96 N. W. 335 (1903), the court holds that the purchaser may elect to specifically enforce the contract against the subsequent purchaser with notice or to treat the conveyance as a breach and hold the vendor for damages.

§ 76. Partial Performance with Compensation. Where the vendor is unable to perform his contract for the sale of lands completely, but is able to perform substantially, so that the purposes or objects of the purchaser will be substantially accomplished by his performance, the vendor may have specific performance against the purchaser, with compensation in the form of a deduction from the purchase price for any failure in exact performance which may exist. This is simply the normal application to such contracts of the doctrine of substantial performance, which is also applied at law to building contracts and contracts of every description where time is not of the essence, either expressly or by implication, and which is applied both at law and in equity to contracts for the sale of land in cases of delayed performance where time is not of the essence.[69]

It is clear that the purchaser cannot be compelled to accept a conveyance if the vendor's failure of performance is at all substantial so that the purchaser will not receive substantially what he bargained for. Specific performance with compensation in favor of the vendor is rare because in most cases the purchaser's rejection of partial performance by the vendor must be sustained. He knows best the purposes for which he contracted to buy the property, and any real doubt as to the substantial character of the vendor's default in performance should be resolved in the purchaser's favor. Nevertheless if the vendor tenders substantial performance he may enforce the contract in equity. In a leading New Jersey case[70] the purchaser was com-

69 See §§ 73, 74, *ante.*

70 Van Blarcom v. Hopkins, 63 N. J. Eq. 466, 52 Atl. 147 (1902), 2 Cook, Cas. Eq. 355. The court discusses Arnold v. Arnold, 14 Ch. D. 270 (1880), in which specific performance was denied because the portion of the land which the vendor could not convey (7 out of 41 acres) constituted the entire street frontage of the tract contracted for; also In re Fawcett, 42 Ch. D. 150 (1889), which gave specific performance to the vendor though the parcel contained 339 square yards less than the 1372 square yards the contract called for, the actual parcel being clearly defined by walls and having been inspected by the purchaser, the court saying: "Looking at what was described to the purchaser, did he get substantially what he contracted for? Did the misrepresentation go to the essence of the contract, and materially alter the substance of it? I agree with Mr. Justice North that it did not, and the misdescription is therefore within the condition, and the purchaser must complete

pelled to take title to a house and plot sold to him as 100 feet front by 255 feet deep, though the width of the lot as conveyed to him was about 93 feet. The misstatement was unintentional, and the actual bounds of the lot were clearly defined so that the purchaser knew definitely the physical lines of the plot when he made the contract of purchase, and the court found that the plot as conveyed gave the purchaser substantially what he contracted for, satisfying the purposes for which the property was purchased, the deficiency being balanced by a proper reduction of the purchase price. It is clear that a substitution of a materially different property will not be allowed though it may be worth as much or more than the property which the contract calls for. Unless the purchaser will get substantially the thing or property he has contracted for, the vendor's action must be dismissed.[71]

with compensation." The New Jersey court refers also to Whittemore v. Whittemore, L. R. 8 Eq. 603 (1869), [753 sq. yds. instead of 573, clerical error] and King v. Wilson, 6 Beav. 124, 49 Eng. Rep. 772 (1843), [plot as 46 ft. deep, actually only 33 ft., purchaser in possession] in which the vendor got specific performance with compensation. In Miller v. Chetwood, 2 N. J. Eq. 199 (1839), specific performance was refused, the plot sold as 9 acres containing a little over 6, and the area being of the essence since the purchase was for subdivision and sale as building lots. Other cases in accord with Van Blarcom v. Larson are Hammer v. Westphal, 120 Md. 15, 87 Atl. 488 (1913); McCourt v. Johns, 33 Ore. 561, 53 Pac. 601 (1898); Farris v. Hughes, 89 Va. 930, 17 S. E. 518 (1893). Unimportant defects in title or in the physical condition of the property, though in violation of the contract, do not bar specific performance in favor of the vendor if they do not prevent substantial performance, and compensation by abatement of the purchase price may be fairly made. King v. Bardeau, 6 Johns. Ch. 38 (N. Y. 1822); Winne v. Reynolds, 6 Paige 407 (N. Y. 1837); Smyth v. Sturges, 108 N. Y. 495, 15 N. E. 544 (1888) [no recovery of damages by vendor at law. But why not, if he tenders substantial performance?]; Capstick v. Crane, 66 N. J. Eq. 341, 57 Atl. 1045 (1903); Thompson v. Carpenter, 4 Pa. 132 (1846); Towner v. Tickner, 112 Ill. 217 (1885).

[71] In Lee v. Rayson, [1917] 1 Ch. 613, the court, referring to a statement by Lord Eldon, said (at 618): "I take that to mean that what the court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the Court is bound to consider every inci-

An entirely different situation is presented when the suit for specific performance is brought by the purchaser instead of against him where the vendor is unable to perform in full. As the rule is generally expressed specific performance to the extent that the vendor is able to perform, with compensation for deficiencies, will be enforced against him because the vendor is bound to perform as far as he can, and justice demands that a proper deduction be made from the purchase price to offset deficiencies in his performance, taking the place of damages for such deficiencies in performance at law.[72]

On the other hand many cases refuse specific performance with compensation when the result will be a transaction differing radically from the sale provided for in the contract, in that it would amount to the making and enforcement *cy pres* of a

dent by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.'' See, also, Hinckley v. Smith, 51 N. Y. 21 (1872); Lombard v. Chicago Congr., 64 Ill. 477 (1872). Of course, where the encumbrance can be readily removed, as by application of part of the purchase money to that purpose, specific performance may be enforced by either party on those terms.

72 Barnes v. Wood, L. R. 8 Eq. 424 (1869); Oceanic Steam Nav. Co. v. Sutherberry, L. R. 16 Ch. D. 236 (1880); Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258 (1895); McCreary v. Stallworth, 212 Ala. 238, 102 So. 52 (1924); Swain v. Burnette, 76 Cal. 299, 18 Pac. 394 (1888); Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 396 (1900); Moore v. Gariglietti, 228 Ill. 143, 81 N. E. 826 (1907), [though the purchaser knew vendor had only a 2/5 interest when contract was made]; Wilkinson v. Kneeland, 125 Mich. 261, 84 N. W. 142 (1900); Campbell v. Hough, 73 N. J. Eq. 601, 68 Atl. 759 (1908); Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497 (1908); Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378 (1895); Napier v. Darlington, 70 Pa. 64 (1871); Yost v. Mallicote's Adm'r, 77 Va. 610 (1883); Wright v. Young, 6 Wis. 125 (1858). See lists of cases cited, 1 Ames, Cas. Eq. 251, 3 Williston, Contracts, 2558, n. 28, and 36 Cyc. 740, n. 72.

In Harsha v. Reid, 45 N. Y. 415, 421 (1871), the court said: ''He [purchaser] was not bound to accept a partial performance with compensation for the part unperformed. But electing to accept partial performance. . . . he was entitled to that compensation which, with the land, would place him in the same situation which he would have been, if he had got precisely that to which he was entitled.''

contract for the parties which they never contemplated.[73] In any analysis of this question we must assume that the contract was valid, unaffected by fraud or mutual mistake, so that the purchaser has an action at law for damages in case the vendor fails to perform. The measure of such damages in England, New York and many other states is such amount as will put the vendee in *statu quo*, not including damages for loss of the contract, when performance by the vendor is impossible because of lack or defect of title which cannot be corrected, and the vendor entered into the contract in good faith without knowledge of his inability to perform.[74] Equity grants specific performance solely as specific relief in protection of a purely legal right because damages at law is not adequate as a substitute for the land to which the purchaser is entitled. The principle of substantial performance requires specific performance though the vendor cannot literally carry out his contract in detail if he is able substantially to perform, as explained in the foregoing paragraph. Can it be said that there is any true specific performance of the contract when the court goes further than this and compels the vendor to do something which is not in substantial performance of his promise, but falls so far short of such performance that it differs radically from what he promised to do? Is it not true that in every such case the court is, in fact, requiring the performance of something differing substantially from what the parties intended, resulting in a transaction which is at best a substitute for that contracted for?

In Durham v. Legard,[75] the estate sold contained 11,814 acres instead of 21,750 as stated in the contract. If the court had granted specific performance with compensation the vendor would have received £36,000 instead of £66,000 which he expected to get and which the purchaser was willing to pay, a penalty of £30,000 for his mistake. So in Rudd v. Lascelles,[76] the fact of restrictions in the title limiting the use of the property would

73 Rudd v. Lascelles, [1900] 1 Ch. 815; Durham v. Legard, 34 Beav. 611, 55 Eng. Rep. 771 (1865); Wheeler v. Gahan, 206 Ky. 366, 267 S. W. 227 (1924); Hall v. Loomis, 63 Mich. 709, 30 N. W. 374 (1886); Corby v. Drew, 55 N J. Eq. 387, 36 Atl. 827 (1897).

74 See *supra* notes 30 and 31 and text to which they are appended.

75 34 Beav. 611, 55 Eng. Rep. 771 (1865).

76 [1900] 1 Ch. 815.

have meant a sale forced by the court for £2,500 of property easily worth £3,500 on the basis of the rental it was bringing in, which was the price fixed by the contract, a loss of £1,000 due to the defect in title of which the vendor was ignorant. The English courts refuse specific performance in these cases because it would amount to imposing on the vendor a transaction entirely different from that contracted for, resulting in very serious injustice.

Professor Williston says there is no good reason for refusing partial performance because of the degree of difference from full performance, that equity has no more right to enforce the doing of something a little different from the contract as made than something widely different.[77] He says that partial performance with compensation is simply the granting of specific relief to the purchaser to the extent of the vendor's ability to perform, combining that with an allowance of the damages for the vendor's breach to which the purchaser would be entitled at law, thus combining legal with equitable relief in order to settle the entire matter in a single action, and therefore the contract as made is enforced in these cases, not a different contract as argued in the cases above cited.[78] This is true in every case except the cases above referred to where the vendor contracted to sell in good faith believing his title to be clear, or believing that his property is of the area described in the contract. In these cases the law in England, New York and many of the other states gives to the vendor the right to rescind by restoring the purchaser to his original position, and the purchaser can recover from the vendor his deposit with interest, and his necessary disbursements for a search, etc., but no damages for breach of the contract.[79] Where this rule applies there is no possibility of combining the allowance of damages at law with specific performance in equity, because the contract cannot be enforced at law. It can only be rescinded and the parties restored to their original position.

It is established law supported by many cases in most of the states as well as in England that partial performance with compensation will be enforced against the vendor, though the performance so enforced is very far from being substantial per-

77 3 Williston, Contracts, 2560.

78 *Ibid.*

79 See *supra* note 31.

formance under the contract.[80] The rule seems to have been arrived at without analysis on general principles, without a reasoned explanation. The doctrine of estoppel suggested in the English cases discussed above is an *ex post facto* explanation. It is in accord with the rule that the purchaser cannot have specific performance if he knew when the contract was made that the vendor could not perform without the concurrence of others, as it would be unfair to permit him to take advantage of the vendor's situation under such circumstances.[81] It is difficult to see any unfairness in enforcing the contract when the vendor and purchaser both knew of the vendor's lack of title, the contract amounting to an undertaking by the vendor to clear the title and convey it to the purchaser, and a number of cases hold that the purchaser may enforce such contracts.[82]

In fact the doctrine of partial performance with compensation is not based on estoppel. Equity gives partial specific performance if the purchaser wants it, on the basis of payment of the full price without compensation in any case.[83] The pur-

80 See *supra* note 72.

81 Hughes v. Hadley, 96 N. J. Eq. 467, 126 Atl. 33 (1924), [clear statement of the rule when vendor sues, and of rule when purchaser sues without notice of defect in vendor's title, but without analysis or reasons]; Maturi v. Fay, 96 N. J. Eq. 472, 126 Atl. 170 (1924); Peeler v. Levy, 26 N. J. Eq. 330 (1875), [the court saying: "It is unconscionable for one man to take the promise of another to do a particular thing which the promisee knows, at the time the promise was made, the promisor cannot perform except by the consent or concurrence of a third person, and then, when consent or concurrence is refused by the third person in good faith, to demand a strict and literal fulfillment of the promise"]; Castle v. Wilkinson, L. R. 5 Ch. App. 534 (1870), 1 Ames, Cas. Eq. 252; Mundy v. Shellaberger, 161 Fed. 503 (1908); Olson v. Lovell, 91 Cal. 506, 27 Pac. 765 (1891); Palmer v. Gould, *supra* note 72. See cases cited, 1 Ames, Cas. Eq. 253, n. See opinion of Fawcett, J., in Rudd v. Lascelles, *supra* note 73, asserting that estoppel is the basis of the rule permitting partial performance with compensation, quoting from Mortlock v. Buller, 10 Ves. 292, 315, 32 Eng. Rep. 857, 866 (1804), and Castle v. Wilkinson, L. R. 5 Ch. 534, 537; and that absence of estoppel is the reason why the courts refuse to apply the doctrine where the purchaser had notice.

82 Barber v. Cox, 4 Ch. D. 464 (1876). St. Denis v. Higgins, 24 Ont. 230 (1893). See cases in which specific performance with compensation is enforced against the vendor when his wife refuses to join, though the purchaser knew he was married, *post* note 86.

83 In these cases the purchaser's

chaser is entitled to the land, or so much of it as the vendor can convey, and the question then arises as to whether justice demands a deduction from the purchase price because of the vendor's failure to perform in full. If the contract is enforceable at law, not subject to rescission only, it is entirely clear that a *pro rata* reduction should be made from the purchase price which he is called on to pay in equity. Limiting the action in this way, equity is simply giving specific relief as far as it can, and making up for the deficiency by enforcing *pro tanto* the purchaser's legal right to damages by deducting that amount from the purchase price instead of and as a substitute for the damages which he could recover at law for the vendor's failure to perform in full. If the vendor is not liable at law, having the right to rescind on returning to the purchaser his deposit with interest and expenses where he has acted in good faith, under the rule in England, New York and many other states, it is just as evident that the purchaser is not fairly entitled to compensation. If he wants specific performance he must forego his remedy at law, which would be limited to the recovery of his deposit and expenses. Under the English rule the vendor cannot be deprived of his right to rescission, restoring the purchaser to his original position, by specific performance with compensation, which is an enforcement of the contract as made, not a rescission.[84]

knowledge of the vendor's defective title is immaterial. See Bennett v. Fowler, 2 Beav. 302, 48 Eng. Rep. 1197 (1840); Litsey v. Whittemore, 111 Ill. 267 (1884); Morse v. Seibold, 147 Ill. 318, 35 N. E. 369 (1893); Anderson v. Kennedy, 51 Mich. 467, 16 N. W. 816 (1883); Burk's Appeal, 75 Pa. 141 (1874). See cases, *supra* note 80.

[84] In Moore v. Gariglietti, *supra*, note 79, the defendant acted in good faith, the plaintiff knowing she had only a 2/5ths interest, and that she made the contract relying on her children, who owned the remaining 3/5ths, joining with her in the sale, which later they refused to do. A forced conveyance of an undivided 2/5ths for 2/5ths of the price, resulting from the court's action, in no way resembled the transaction which the contract called for, and was not intended by either party. In Reisz's Appeal and in Kuratli v. Jackson, *post* note 87, the courts refused to allow a deduction for inchoate dower, giving as a reason that the enforcement of the contract on the basis of such deduction would be the making of a different contract for the parties contrary to their intent, and would be unfair to the vendor. In these cases the vendor could not claim the right to rescind under the English rule at law, as both parties had full knowledge of the defect in the title when

Cases in which the defect in the vendor's title is his wife's inchoate right of dower, she refusing to join, are disposed of in various ways in different states. The prevailing rule, based on sound reason, is that the purchaser may have specific performance with compensation, though he knew when the contract was signed that the vendor was married. There is no suggestion in such a case of any inequitable taking advantage of the vendor by the purchaser, who has every right to believe that the vendor's wife will join her husband in his conveyance in order to bar her dower, the normal performance of such contracts. He is entitled to the land to the extent that the vendor can convey, and justice demands that he be protected against possible loss through enforcement of dower, either by a deduction

the contract was made and vendor's liability to full damages at law would be clear. It must be remembered that specific performance with compensation penalizes the vendor to the extent of the deduction, as he gets that much less for his land, while at law the purchaser's damages which he would have to pay might be a nominal sum, viz., the difference between the contract price and the fair market price of the property as described in the contract on the basis of a marketable title. Though in terms of contract specific enforcement with compensation is equivalent to full performance as stated by Professor Williston, the discretionary power of equity to withhold specific relief where damages would be more fair and just for any reason may well be applied in such cases. Certainly equity should leave the parties to the legal remedy where the purchaser's only right at law is to rescind, as explained in the text. But in many other cases, such as Durham v. Legard, *supra* note 75, Rudd v. Lescelles, *supra* note 76, Peeler v. Levy, *supra* note 81 [defendant's wife had title to two of the four tracts which her husband contracted to convey], and the cases above referred to, there is sense and justice in leaving the parties to the remedy at law when specific performance with compensation means a serious loss to the vendor due to mistake or misfortune, and a corresponding advantage therefrom to the purchaser, when damages at law would restore the purchaser to his original position and give him damages for the loss of the contract. See analogous cases of hardship, § 104, *post*.

That specific performance with compensation is equivalent to enforcement of the contract at law, differing radically from rescission and the restoring of the parties to their original position, see McCreary v. Stallworth, 212 Ala. 238, 102 So. 52 (1904), 2 Cook, Cas. Eq. 392, holding that specific performance with compensation barred an action at law for damages arising out of the vendor's failure to convey the remaining 3/8ths interest, as the "compensation" deducted from the purchase price covered the damages which the plaintiff might have recovered at law.

from the purchase price of the present value of the inchoate dower,[85] or in some other way.[86]

In Pennsylvania, Oregon and some other states the courts refuse specific performance except on payment of the full price, based on the reason that to allow compensation for dower would tend to put pressure on the wife to give up her dower contrary to her interest, and might tempt the husband to undue means to procure her consent. These cases also assert that to enforce a sale subject to dower with compensation[87] would be in effect

[85] O'Malley v. Miller, 148 Wis. 393, 134 N. W. 840 (1912), citing Wright v. Young, 6 Wis. 127 (1857), [indicating the method of determining the value of the inchoate right]; Conrad v. Schwamb, 53 Wis. 372, 378, 10 N. W. 395 (1881); Park v. Johnson, 86 Mass. (4 Allen) 259 (1862); Hazelrig v. Hutson, 18 Ind. 481 (1862). As to computation of the value of inchoate dower, see Share v. Trickle, 183 Wis. 1, 197 N. W. 329 (1924), quoting from Jackson v. Edwards, 7 Paige 386, 408 (N. Y. 1839) and citing Gordon, R. & Co. v. Tweedy, 74 Ala. 232 (1883) and Strayer v. Long, 86 Va. 557, 10 S. E. 574 (1890), as following the same rule. See, however, Minge v. Green, 176 Ala. 343, 58 So. 381 (1912), *post* note 87.

For the New York cases, see Kupferberg v. Beatty, 122 Misc. 217, 202 N. Y. Supp. 712 (1923), and cases cited therein, discussed (1924) 9 Corn. L. Q. 470.

[86] Bradford v. Smith, 123 Iowa 41, 98 N. W. 377 (1904), [one-third of purchase money to be retained by the clerk of the court to protect the dower of the vendor's wife in case she survive him, and to be paid to him if she die first, or to be retained by purchaser during interval, vendor having lien on land therefor. No interest thereon to be paid vendor]; Wannamaker v. Brown, 77 S. C. 64, 57 S. E. 665 (1906), [similar arrangement, but vendor to receive interest until question of survival of husband or wife be determined.] See N. J. cases in note following, the court directing the vendor to give a bond duly approved to indemnify the purchaser in case wife gets dower, or in default of the bond, the purchaser to retain as indemnity a sum equal to the present value of her dower if consummated at date of the decree. See (1924) 9 Corn. L. Q. 470.

[87] See note 84, *ante*. Reisz's App., 73 Pa. 485 (1873); Kuratli v. Jackson, 60 Ore. 203, 118 Pac. 192 (1911), [court's decision was based on fact that the purchaser knew the vendor was married, practically always the situation in these cases]; Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097 (1904). See Tebeau v. Ridge, 261 Mo. 547, 170 S. W. 871 (1914) overruling Aiple-Hemmelmann Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480 (1908), and adopting the general rule. In New Jersey the courts modify this position by holding that if the husband induced his wife to refuse to release her dower, specific performance will be ordered with protection

to make a new contract for the parties which the vendor would not have been willing to make.

of the purchaser against dower as explained in the preceding note. Stein v. Francis, 91 N. J. Eq. 205, 109 Atl. 737 (1919); Schefrin v. Wilensky, 92 N. J. Eq. 109, 111 Atl. 660 (1920). In Stein v. Francis, *supra,* the court introduced another modification by holding that if the wife knew all about the contract at the time it was made, and apparently acquiesced therein, the danger of undue pressure on her was absent and specific performance with protection of the purchaser against dower would be enforced though no proof existed that the husband had induced her not to sign.

CHAPTER XVI

THE STATUTE OF FRAUDS AND SPECIFIC PERFORMANCE

§ 77. **Contracts Void Under the Statute.** The English Statute of Frauds provided in part that "no action shall be brought whereby . . . (3) to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."[1] In New York, Michigan and many other states the corresponding statute provides that every contract for the sale of land or an interest therein, or for the leasing for a longer period than one year, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the grantor or lessor or by his duly authorized agent.[2] The statutes vary in detail in different states. The Statute is a complete bar to the enforcement at law of any contract falling within its terms which is not executed as required by the Statute. If no valid enforceable contract exists at law it follows that it cannot be enforced in equity. But it is said that if it is partially executed on one side so that justice demands that it be enforced on the other side, equity will decree its specific performance in spite of the Statute of Frauds. An examination of the different classes of cases of this kind and the principles on which they turn follows.

§ 78. **The Degree of Part Performance Which Causes Equity to Act.** In England if the purchaser is let into possession by the vendor under a parol contract of purchase, equity

1 29 Car. II, c. 3.

2 N. Y. Real Property Law, § 259; 1 Mich. Comp. Laws (1915), §§ 11975–11979, § 8.

will compel the vendor to convey in accordance with the contract. The reason given in several of the cases is that if there is no valid contract the possession of the purchaser makes him a trespasser, and he is liable as such, and the contract which led him into this position would be a fraud upon him unless enforced.[3] This argument has no merit whatever, because it is clear that the purchaser is, in such cases, a tenant at will, in any event at least a licensee, and therefore it would be quite impossible for the vendor to hold him as a trespasser because of his possession.[4] Payment of part or all of the purchase price is not such performance as will cause equity to enforce the contract.[5] The purchaser's remedy at law, viz., recovery of his payment, is adequate.

In the United States it is the rule almost everywhere, as in England, that mere payment of the purchase price in whole or

3 Foxcraft v. Lister, Colles, P. C., 108, 1 Eng. Rep. 205 (1700); Lockey v. Lockey, Prec. Ch. 518, 519; 24 Eng. Rep. 232 (1719); Butcher v. Butcher, 1 Vern. 363, 23 Eng. Rep. 524 (1685); Clinan v. Cooke, 2 Sch. & Lef. 22, 41 (Ir. Ch. 1802), [part payment held not sufficient part performance. The court said: ". . . if upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of Foxcraft v. Lister, Prec. Chan. 519, 2 Vern. 456. . . . Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout"].

4 The argument in Clinan v. Cooke, *supra* note 3, that if the evidence is admissible to prove a license it should be received to establish the contract, is a clear case of *non sequitur*. The Statute in no way affects proof of a license. It expressly forbids proof of a contract except by a writing signed as the Statute requires. That a tenancy at will arises in such case see Harris v. Frink, 49 N. Y. 24 (1872), and cases therein cited. That a purchaser of trees under a parol contract void under the Statute who enters and cuts the trees before being forbidden is a licensee, see Drake v. Wells, 93 Mass. (11 Allen) 141 (1865); Leonard v. Medford, 85 Md. 666, 37 Atl. 365 (1897); Bennett v. Scutt, 18 Barb. 347 (N. Y. 1854); and other cases cited, Walsh, Property (2nd Ed.), § 12, n. 4 and n. 5.

5 Clinan v. Cooke, *supra* note 3; Britain v. Rossiter, 11 Q. B. D. 123 (1879), and other cases cited, 1 Ames, Cas. Eq. 276, overruling earlier English cases. See discussion of the development of this rule in England, the earlier cases treating a substantial payment as taking the case out of the Statute, in article by J. N. Pomeroy, 36 Cyc. 652.

in part is not such part performance as will take the case out of the statute.[6] Though there is a good deal of authority supporting the English rule that letting the purchaser into possession is sufficient part performance to cause equity to give relief,[7] the view generally prevailing is that such possession

[6] Townsend v. Fenton, 32 Minn. 482, 21 N. W. 726 (1884), 2 Cook, Cas. Eq. 429 [holding that insolvency of the vendor makes no difference in the rule]; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252 (1890); Miller v. Ball, 64 N. Y. 286 (1876); Russell v. Briggs, 165 N. Y. 500, 59 N. E. 303 (1901); Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391 (1894); Harney v. Burhaus, 91 Wis. 348, 64 N. W. 1031 (1895). See list of cases cited, 1 Ames, Cas. Eq. 276, 277, n. By statute in Iowa and Georgia part payment makes the contract enforceable. Iowa Comp. Codes, 1919, § 7333; Geo. Civil Code, 1910, § 4634.

For the same reason performance of services in consideration of the parol promise to convey gives no right to compel the vendor to convey. Maddison v. Alderson, *post* note 10; Burns v. McCormick, *post* note 10, Russell v. Briggs, *supra*.

Where the purchaser is to pay in part by conveyance of land to the vendor, the conveyance of such land alone, like the payment of the purchase price or part thereof alone, does not take the case out of the Statute. See cases cited, Ames, Cas. Eq. 278, n. 3, n. 4. But here as in other cases if possession is given to the plaintiff and he changes his position by improvements, he is equitably entitled to the property, his prior conveyance to the defendant, like payment of part of the purchase price, possibly adding something to the strength of his equity. Bigelow v. Armes, 108 U. S. 10 (1882); Roberge v. Winne, 144 N. Y. 709, 39 N. E. 631 (1895).

[7] 4 Kent, Comm. 451; Eaton v. Whitaker, 18 Conn. 222 (1846); Bradley v. Loveday, 98 Conn. 315, 119 Atl. 147 (1922); Puterbaugh v. Puterbaugh, 131 Ind. 288, 30 N. E. 519 (1892); Canham v. Mooney, 73 Mich. 184, 41 N. W. 223 (1889); Wharton v. Stouterburgh, 35 N. J. Eq. 266 (1882). See cases cited, 1 Ames, Cas. Eq. 279, 280 n.

In Lamb v. Hinman, 46 Mich. 112, 6 N. W. 675 (1881), the court said that the reason why the taking of possession is a ground for specific performance when payment of the purchase price is not, is that in the former case there is no standard for the estimate of damages. The purchaser in taking possession is likely to change very materially the general course of his life, and repudiation of the contract will result in injury not easily measured. This amounts to the argument that change of possession involving an important change of one's plan of life is a change of position which demands specific performance in order to prevent serious and immeasurable injury to the purchaser.

Mr. Pomeroy says (36 Cyc. 653): "The decisions are but a handful in which possession is recognized as a sufficient ground and appears, on an examination of the reputed facts, to be the only ground," citing an early case from each of the follow-

alone is not enough, but possession accompanied with payment of part or all of the purchase price will take the case out of the Statute in equity.[8] In many states, therefore, we have this peculiar and unsatisfactory position, that part payment alone and possession alone give the purchaser no right to enforcement

ing jurisdictions: Arkansas, Maryland, New Jersey, New York, Pennsylvania, and the federal courts. In New York and Pennsylvania these early cases are no longer law. See *post* note 11. In the cases above cited, and in many of the cases referred to in the following note, the courts sustain the doctrine that possession is sufficient part performance, but in many cases such statements are *dicta*, as other reasons, such as part payment of the price by the purchaser or expenditures for improvements, usually exist in these cases. However, Bradley v. Loveday, *supra*, stands definitely for the English rule, though part payment was present in Eaton v. Whitaker, *supra*. In Iowa the Statute expressly excepts cases where possession has been transferred. Agne v. Seitsinger, 85 Ia. 305, 52 N. W. 228 (1892).

8 Mr. Pomeroy says (36 Cyc. 654), that possession and payment combined are sufficient part performance to take the case out of the Statute in nearly all American states, citing a long list of cases. A few of the many cases so holding follow: Rovelsky v. Scheuer, 114 Ala. 419, 21 So. 785 (1896), [See Alabama Statute requiring part payment (Code, § 2152); Nelson v. Shelby Co., 96 Ala. 565, 11 So. 695 (1892)]; McCarger v. Rood, 47 Cal. 138 (1873), [See Cal. Statute excepting part performance cases, Civ. Code, § 1741]; Wilke v. Miller, 171 Ill. 556, 49 N. E. 484 (1898), [but see Stephens v. Collison, *post* note 26. "The part performance must be such as to put the party in such situation that it would be a fraud upon him not to let the agreement be fully performed. Weir v. Weir, 287 Ill. 495, 122 N. E. 868"]; Ayres v. Short, 142 Mich. 501, 105 N. W. 1115 (1905); Winfield v. Bowen, 65 N. J. Eq. 636, 56 Atl. 728 (1903); Bartz v. Paff, 95 Wis. 95, 69 N. W. 297 (1896). In several states statutes actually or in effect modify the usual provisions of the statute by making the giving of possession and part payment of the price operate like delivery or payment in sales of chattels under the Statute. In addition to the statutes of Ala., Cal. and Iowa referred to above, see Colo. Gen. St. § 1519; Idaho, Code, § 6008; Ind. Burns Rev. St. (1899), § 6633; Mich Howell Annot. St. § 6183. These statutes must be kept in mind in weighing cases decided in those states. A modification of the Statute in this way by legislation is the proper way to make transfer of possession or part payment or both together a substitute for a writing. Clearly equity has no authority to do this. Equity may enforce an equitable right arising out of an estoppel in these cases, though the estoppel requires the enforcement of a void contract, just as a void deed may be enforced on the same principle. See *post* § 79.

in equity of the void parol contract, but if both of these facts appear in any case equity will act. Why the combination of these facts makes either of them move effective to create an equity in favor of the purchaser is not explained, for the very good reason that no reasonable explanation can be given.

The possession of the purchaser must be such that it can be explained only on the basis of a contract for the land, as unequivocally referring to the contract. If the purchaser's possession is simply the continuance of a former possession as tenant or licensee,[9] or where it may be that of a servant or caretaker rather than the possession of a purchaser, it is not sufficient.[10] The reasons and principles on which these rules of part performance depend are discussed in the section following.

In New York and several other states the courts have put this doctrine of part performance under the Statute on a rational basis by refusing specific performance unless the purchaser has not only been let into a possession which unequivocally indicates a contract of purchase, but also has changed his position by making improvements or by doing other things in reliance upon the contract so that it would be unfair or unjust not to convey the property to him as the contract provides.[11] In many of the

9 Smith v. Turner, Prec. Ch. 561, 24 Eng. Rep. 252 (1720), 1 Ames, Cas. Eq. 282; Andrews v. Babcock, 63 Conn. 109, 26 Atl. 715 (1893); Koch v. National Un. Bldg. Ass'n, 137 Ill. 497, 27 N. E. 530 (1891), [equivocal possession by tenant]; Emmel v. Hayes, 102 Mo. 186, 14 S. W. 209 (1890). That this is the settled rule, see Ames, *ibid.* 282, n. 3. For like reasons continued possession by a tenant in common is not sufficient. Roberts v. Templeton, 48 Ore. 65, 80 Pac. 481 (1905).

10 Maddison v. Alderson, 8 App. Cas. 467 (1883); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922).

11 Thus in Miller v. Ball, 64 N. Y. 286 (1876), the court said: "The general rule is, that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. . . . Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute." The court held that the payment of the consideration created the clear inference that the vendor acquiesced in the plaintiff's taking possession, and an expenditure for improvements equal to the purchase price, and the payment of taxes, otherwise lost to him, required specific per-

states in which the courts have held that giving possession and receiving part payment takes the sale out of the Statute, the

formance of the vendor's parol promise to convey. To same effect, Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783 (1897); Canda v. Totten, 157 N. Y. 281, 51 N. E. 989 (1898); McKinley v. Hessen, 202 N. Y. 24, 95 N. E. 32 (1911); Burns v. Daggett, 141 Mass. 368, 6 N. E. 727 (1886); Williams v. Carty, 205 Mass. 396, 91 N. E. 392 (1910). In Burns v. Daggett, *supra*, specific performance was refused because not necessary to protect the purchaser in possession from any loss. His use and occupation of the property greatly exceeded in value the amount expended by him on the premises. In Williams v. Carty, though the purchaser in possession had paid nothing for repairs before discovering that the vendor had fraudulently omitted part of the land in preparing the deed; nevertheless in moving into a new home he abandoned the old, and so changed his position, paying in full for the entire property, and taking a conveyance of part, that he was entitled to the conveyance of the balance.

"Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to remove himself and his property from the premises after such revocation." Wells, J., in Glass v. Hulbert, 102 Mass. 24, 33 (1869). The court also said, at p. 32, referring to the rule that possession under the contract takes it out of the statute:—"If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts."

To same effect, see Hart v. Carroll, 85 Pa. 508 (1877); Graft v. Loucks, 138 Pa. 453, 21 Atl. 203 (1891); Derr v. Ackerman, 182 Pa. 591, 38 Atl. 475 (1897); Griffith v. Abbott, 56 Vt. 356 (1883); Holmes v. Caden, 57 Vt. 111 (1884); Morris v. Gaines, 82 Tex. 255, 17 S. W. 538 (1891); Cobb v. Johnson, 101 Tex. 440, 108 S. W. 811 (1908); Purcell v. Miner, 71 U. S. (4 Wall.) 513 (1866).

In many states in which the rule prevails that the giving of possession together with acceptance of part payment take the transaction out of the statute, the principal of the above cases has been clearly expressed and applied. See Lamb v. Hinman, quoted *supra* note 7; Stephens v. Colliston, quoted *supra* note 8; Telford v. Chicago & C. R. Co., 172 Ill. 559, 50 N. E. 105 (1898); Baker v. Allison, 186 Ill. 613, 58 N. E. 233 (1900); Felt v. Felt, 155 Mich. 237, 118 N. W. 953 (1908); Wright v. Pucket, 22 Gratt. 370 (Va. 1872); Venable v.

fundamental principle that the contract is enforced in equity because the purchaser has been led by the contract to so change his position that repudiation of the contract at law, leaving him without remedy, would be unjust and unfair, is recognized and applied in many of the cases, especially the later ones. This movement toward the correction of the ill-considered reasoning of the earlier cases has progressed so far that the general acceptance of the doctrine as expressed in the later New York cases may be confidentially expected. The reasons underlying the doctrine of partial performance under the Statute will now be examined.

§ 79. **Reasons for Specific Enforcement of Parol Contracts Unenforceable Under Statute.** The argument that part performance by giving possession is a reasonable substitute for the writing which the Statute requires because it tends to eliminate the danger of fraud and perjury, though probably the basis of the early cases, can no longer be taken seriously because admittedly the contract continues unenforceable at law, and equity does not pretend to change the legal interpretation of the Statute. The English cases by which the doctrine was established, based it not only upon transfer of possession but also upon the unfairness or "fraud" to the purchaser if the contract should not be enforced, partly because he would be liable as a trespasser and partly because of the loss through his change of position either by expenditures in improving the property or by changing his mode of life or business relying on performance of the contract.[12] The suggestion that if parol evidence is received to disprove a trespass by the purchaser it might as well be received for all purposes is obviously untenable, as explained very clearly by a Massachusetts judge.[13] The English rule, that possession with the vendor's consent takes the case out of the Statute irrespective of the purchaser's change of position by improvements and the like, seems to be based, consciously or unconsciously, on the thought that such possession is an effective substitute for a writing in the prevention of perjury and fraud.

Stamper, 102 Va. 30, 45 S. E. 738 (1903), [boarding the vendor, taking possession and working the land not sufficient].

12 See cases cited, *supra* note 3.

13 Welles, J., in Glass v. Hulbert, quoted *supra* note 11. See, also, *supra* note 4.

This is indicated by the emphasis put upon the requirement that such possession must indicate unequivocally a contract to sell or lease.[14] But surely equity has no right to amend the Statute by introducing an exception of this kind corresponding to the exception in the section of the Statute relating to sales of personalty by which part payment or delivery makes the sale good though not in writing. If these cases cannot be based on an equitable principle which demands interference by equity as in other cases of equitable relief in direct conflict with the law, they amount to a usurpation of power without justification. However remiss the courts may have been in working out a logical basis for their action in these cases, we cannot fairly conclude that there has been any such purpose of amending the Statute by judicial legislation not based on the enforcement of an equitable principle. Beginning with the early case of Foxcraft v. Lister,[15] in most of the cases the court has based its action upon the "fraud" or injury to the purchaser if left to his remedy at law on repudiation of the contract by the vendor under the Statute. Though the courts were mistaken in their argument that he would be liable as a trespasser in such cases, their purpose to protect the purchaser from unconscionable wrong after he has been led to change his position relying on the parol contract under which both parties have acted, is perfectly clear.[16] The vendor is estopped from setting up the invalidity of the contract when the parties have proceeded under it to a point which makes repudiation of the contract by the vendor impossible without substantial and unjustifiable injury to the purchaser. The recognition of this doctrine in the federal courts, New York, Massachusetts, Pennsylvania and in many other states, though varying somewhat in the form of expression and in application, has proceeded so far that it may be now regarded as the prevailing law in the United States.[17] For the reasons stated above we may fairly regard this principle as fundamentally the basis of the English law as well, since the only alternative would be an arbitrary judicial amendment of a great Statute, in no way based on any principle of equity.

14 Maddison v. Alderson, *supra* note 10.

15 *Supra*, note 3.

16 See cases cited, *supra* notes 3, 5, 6, 9, 10, 11.

17 See *supra* note 11.

The term "part performance" in this connection is unfortunate. It tends to confuse equity's action, which can be justified only because based on some equitable principle, with part performance of contracts for the sale of chattels, which by the express terms of the Statute eliminates the need of a writing. The cases recognize that this exception making part payment or delivery equivalent to a writing in sales of chattels, makes very clear that no such exception was intended in the statutory provision applying to contracts for the sale or leasing of land.[18] Furthermore the "part performance" which causes equity to act is not performance of the contract at all. Taking possession and making improvements by the purchaser is in no sense performance. Assuming a valid contract, could the purchaser be held liable for a breach if after paying the purchase price he failed to enter and make improvements? His performance of the contract is in paying the purchase price, yet it is held universally that such payment in whole or in part is not such "part performance" as will take the case out of the statute.[19] In truth "part performance" of the contract has nothing to do with the situation. It is entirely a matter of whether or not the vendor is estopped by giving possession to the purchaser and leading him in reliance on the contract to change his position in such way that performance of the contract is the only fair way out.

In several southern states the entire doctrine of enforcement of parol land contracts because of "part performance" is re

18 In Clinan v. Cooke, *supra* note 3, the court said: "But the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said (Section 13), that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it would bind in the case of goods, and were silent as to the case of lands, they mean that it should not bind in the case of lands." That this applies just as truly to delivery of possession goes without saying.

19 Cases cited, *supra* notes 5 and 6. If it is thought desirable that part payment or delivery should take the case out of the operation of the statute as in the case of chattels, the statute should so provide, as in Georgia and Iowa. See statutes of these states referred to *supra* note 6, also those and other statutes modifying the Statute of Frauds in cases of part payment and delivery of possession, *supra* note 8.

jected, and specific performance is refused, no doubt because of this awkward and mistaken form in which the doctrine has been developed.[20] Equitable relief is given, however, by requiring the vendor to pay the increased value of the land due to the purchaser's improvements, plus payments of purchase money less rental value during the purchaser's occupation.[21] Specific

20 Albea v. Griffin, 2 Dev. & B. 9 (S. C. 1838), 1 Ames, Cas. Eq. 288, and cases cited, 289, n. from South Carolina, North Carolina, Kentucky, Tennessee and Mississippi.

21 See preceding note.

Dean Pound, in Progress of the Law (1920), 33 Harv. L. Rev. at 933 *et seq.*, reviews the development of equitable enforcement of parol contracts unenforceable at law under the Statute. He says (at 936): "What the courts actually did was to assume the Statute applicable in equity and then take particular cases out of its purview by reason of fraud or because the bargain was 'executed'—and this from a time almost contemporary with its enactment." Referring to Lord Selborne's theory that equity enforces the "equities" of the plaintiff arising from his change of position, not the contract (Maddison v. Alderson, *supra* note 10) he said: "This *ex post facto* rationalization of what has gone on in equity for historical reasons, seems to be open to a conclusive objection. The courts have not enforced and do not enforce the equitable claims of the plaintiff arising from fraud or part performance as such, but rather the contract itself. . . . The 'equities' of one who has been put in possession or of one who has partly performed, call for making him whole for what he is out upon the faith of the contract, so far as a court of equity may do so." He then refers with approval to the line of southern cases cited *supra* note 20, which so hold. But enforcement of the contract, deed or other transaction on which the plaintiff has been led to rely, not merely restitution, is the normal remedy in equity in all cases of estoppel. It is the better remedy as it gives the plaintiff the full advantage of his expenditures, not mere restitution. Equity does not give effect to the deed, mortgage or contract enforced on the ground of estoppel as actually valid, but rather as though it were valid by preventing the defendant from setting up its invalidity. As to the implied criticism of *ex post facto* rationalizations of the law, if they are to be excluded so-called "research" at the law schools might as well cease. The history of the law is made up largely of tentative forward steps taken for reasons which seem to have been felt rather than expressed, later rationalized and developed by judges and legal scholars. The process is often very slow, as in these cases, but a solution is being arrived at. See Dean Pound's treatment of the historical causes of the early decisions as based upon a transfer of seisin which accomplished the practical purposes of the Statute, and his statement that the doctrine of Maddison v. Alderson, *supra* note 10, and the later American cases combining the saving of the policy of the Statute by requiring a transfer

enforcement gives more complete relief, and since equity intervenes the best relief should be given.

§ 80. **Parol Contracts to Sell Land; Vendor as Plaintiff.** The true character and basis of equitable relief in these so-called "part performance" cases is seen more clearly where the vendor or lessor is the plaintiff. In these cases there can be no pretence that the taking of possession and the making of improvements by the purchaser will result in injury to the vendor requiring specific performance in his favor. Though it has been said that by the doctrine of mutuality of remedy the vendor or lessor must be given specific performance in such a case because the purchaser or tenant would be entitled to that remedy[22] that doctrine is now thoroughly discredited, and the vendor or lessor is given relief according to the better considered cases, only where he has so changed his position by making improvements or alterations under the terms of the contract, and relying thereon, or the property has been so changed or depreciated by the purchaser, that specific enforcement in equity is required to save him from unfair loss exactly as in the corresponding cases in which the purchaser or tenant is the plaintiff.[23] Certainly

of possession solely referable to a contract, with other facts creating an equity in favor of the purchaser, is "in the right line of progress toward a satisfactory law upon this subject."

22 In Seaman v. Aschermann, 51 Wis. 678, 8 N. W. 818 (1881), 2 Cook, Cas. Eq. 447, the court said (*dictum*): "It is self-evident that this equitable relief must be mutual. If there has been sufficient execution or performance of the parol contract to entitle the lessee to enforce it, the lessor has the same equity, and both will be entitled to specific performance." That this doctrine of mutuality of remedy is no longer accepted, see § 68, *ante*.

23 Seaman v. Aschermann, *supra* note 22, the court, after the *dictum* quoted above, deciding the case on the true ground of the tenant's estoppel, the lessor having been put to great expense in remodeling the block of stores to make them suitable for the tenants who entered and paid rent for two years, neglecting to sign the lease for 5 years. The court quotes Potter v. Jacobs, 111 Mass. 32 (1892), involving the more usual suit by the purchaser, in which it is stated that "the defendant is estopped to set up the statute of frauds in defense." See Andrews v. Babcock, 63 Conn. 109, 26 Atl. 715 (1893), though laying down the rule that possession creates the right to enforce specific performance, in fact turns on the lessor's change of position by making expensive changes for the tenant. See cases cited, 1 Ames, Cas.

the mere transfer of possession without accompanying change of position on the part of the vendor or lessor is no reason for giving him specific performance unless we regard the transfer of possession as a substitute for a writing, a position which is untenable, as we have seen.[24]

§ 81. **Parol Gifts or Promises to Give Land.** Where a parol gift of land is made or promised as where a father makes a gift of land to his son, or promises to give it to him, if he will take possession and live on it, and the son takes possession and improves the property, relying on the parol promise of his father, equity will compel a conveyance of the land to the son. Though the father had made the offer in writing, no contract exists in most of these cases, the intent being to make a gift on condition, and the taking of possession and improving the property is not intended as a contractual consideration for the father's promise.[25] However, where it appears that a contract was intended, the working and improvement of the land, or services rendered by the son being the consideration for the father's promise, it is unenforceable at law when not in writing. Nevertheless relief in equity is given in both cases, in spite of the fact that no valid enforceable contract exists at law in either case,

Eq. 281, for the proposition that transfer of possession gives the vendor or lessor an action for specific performance, just as such possession gives the remedy to the purchaser or tenant, including the cases above discussed. Where the purchaser has so changed the property that it would be unfair to compel the vendor to receive it back in its altered or depreciated state, it is clear that specific performance should be ordered, based on estoppel, not on "part performance." Lawrence v. Saratoga, etc., R. Co., 36 Hun. 467 (N. Y. 1885), [building railroad on land], In re Fay, 213 Pa. 428, 62 Atl. 991 (1906), [depreciation by quarrying stone]. See Wharton v. Stoutenburgh, 35 N. J. Eq. 266 (1882), [Defendant took possession and worked mine under parol contract for a lease]; Cramer v. Mooney, 59 N. J. Eq. 164, 44 Atl. 625 (1899); Steenrod v. Wheeling, etc., R. Co., 27 W. Va. 1 (1885), [R. R. Co. had defeated action to recover land by setting up contract; now estopped to deny its validity under statute].

24 See preceding section.

25 1 Williston, Contracts, § 112. If it appear that the act of moving and taking possession is not intended as a condition to a gift or promised gift, but rather as a true consideration for the conveyance or promise to convey, rarely the fact in these cases, there is a valid consideration for the conveyance or promise.

if the son has taken possession and made improvements.[26] The father is estopped from denying the validity of the parol gift or promise to make a gift in the situation first referred to above, and from setting up the Statute of Frauds in the latter case. In all of them the equity of the plaintiff is the same. Reason and justice demand that the father make good his promise by conveying the land to his son, because the son has been led by his father's promise to radically change his position, and if the

26 Freeman v. Freeman, 43 N. Y. 34 (1870), 1 Ames, Cas. Eq. 306; Young v. Overbaugh, 145 N. Y. 158, 39 N. E. 712 (1895); Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526 (1888); Irwin v. Dyke, 114 Ill. 302, 1 N. E. 913 (1885); Standard v. Standard, 223 Ill. 255, 79 N. E. 92 (1906); Stephens v. Collison, 313 Ill. 365, 145 N. E. 81 (1924); Fowler v. Isbell, 202 Mich. 572, 168 N. W. 414 (1918); Eyre v. Eyre, 19 N. J. Eq. 102 (1868); Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073 (1891); Raymond v. Hattrick, 104 Wash. 619, 177 Pac. 640 (1919), [Rule applies to gifts as well as to contracts]; Ludwig v. Ludwig, 170 Wis. 41, 172 N. W. 726 (1919), [entry by parent, no improvements—son's promise mere gratuity].

Proof of the parol contract must be definite and convincing and his possession must be unequivocal to cause equity to act. See above cases, particularly Stephens v. Collison, *supra*.

The position taken in a few cases that relief will be refused if the value of the use and enjoyment substantially equals the improvements [Burris v. Landers, 114 Cal. 310, 46 Pac. 162 (1896), (expenditure less than half rental value); Woolridge v. Hancock, 70 Tex. 18, 6 S. W. 818 (1888)], has been generally rejected because in that case "the equitable title would always be defeasible, for a time must come when compensation will be complete; and the right of the donee would depend on the time when he called for the conveyance," from opinion in Young v. Glendinning, 6 Watts. 509, 510 (Pa. 1837). To same effect, Mims v. Lockett, 33 Ga. 9 (1861); Young v. Overbaugh, *supra* [expressly repudiating doctrine of balancing rental value]; Wells v. Davis, 77 Tex. 634, 14 S. W. 237 (1890), [rental value $400, improvements $187. Compare with Burris v. Landers, *supra*]. These cases establish the reason why the courts grant specific performance of parol contracts of sale, though the value of improvements is equal or less than the value of the use and occupation. The suggestion in Burns v. Daggett, *supra* note 11, that this reason bars specific performance in Massachusetts, is not established by that case, as the facts showed no such change of position on the purchaser's part as would justify specific performance under the general rule. No doubt the value of such possession must be given due weight in any case in determining the possessor's equity, if any. The differences in the cases are merely differences as to the extent of injury to plaintiff required to justify equitable interference.

promise is not enforced he will suffer substantial loss for which he will have no remedy at law. It does not matter, therefore, whether the contract is void for want of consideration or because of the defense of the Statute of Frauds. Invalidity of the contract does not matter. To prevent a wrong akin to fraud, equity finds it necessary to enforce the invalid promise. Whether we call this specific enforcement of a contract, based on estoppel or the enforcement of a trust which equity impresses on the title held by the father, is not important. We are merely calling the same equitable relief by different names. These cases should make clear that equity acts in the cases of part performance discussed in the preceding sections, not in modification of the Statute, but rather in the enforcement of an equity which arises from the facts of the case. It is settled law practically everywhere that the donee must not only be given possession pursuant to the gift or promise which unequivocally refers thereto, but there must be a substantial change in his position through expenditures for improvements or otherwise, as the basis for equitable relief.[27] As these cases cannot be distinguished in principle from the part performance of parol contract cases discussed in the preceding sections, it is submitted that these cases should be added to those cited and discussed in note 10, *supra*, for the proposition that there must be a substantial change of position in addition to possession creating an equity by estoppel, often in opposition to cases in the same jurisdiction declaring possession and part payment as together requiring specific performance.

§ 82. Change of Position Without Unequivocal Change of Possession. By weight of authority equity will not intervene, no matter how serious the plaintiff's change of position may have been, unless he has been given possession which indicates unequivocably the contract to sell or lease which the plaintiff seeks to enforce. Thus in Maddison v. Alderson,[28] the plaintiff performed services as housekeeper for the deceased for many years without pay, and gave up other prospects in life, relying on his parol promise to devise to her the property in question. But he, not she, was in possession, her residence with her employer being that of a servant, and there was no physical fact

[27] See preceding note.

[28] *Supra* note 10.

to indicate a contract to give her the land rather than to pay her wages. In Burns v. McCormick,[29] the plaintiffs gave up their business in another town, moved into the home of the deceased and boarded and took care of him until his death relying on his parol promise to give them his house on his death. Here as in the Maddison case possession was in the promissor, not in the plaintiffs, the apparent facts being quite as consistent with a contract to pay the plaintiffs for their services as with a promise to give them the property. In both cases the court refused specific performance for that reason. Judge Cardozo said that this requirement is " 'intended to prevent a recurrence of the mischief' which the statute would suppress. (Quoting Maddison v. Alderson.) The peril of perjury and error is latent in the spoken promise. Such, at least, is the warning of the statute, the estimate of policy that finds expression in its mandate. Equity . . . does not treat the statute as irrelevant, nor ignore the warning altogether. It declines to act on words, though the legal remedy is imperfect, unless the words are confirmed and illuminated by deeds. . . . The power is not exercised unless the policy of the law is saved."

It is evident, therefore, that transfer of possession definitely indicating the contract is insisted on as a condition precedent to equitable relief because the contract is then evidenced by a patent fact which removes danger of fraud and mistake, in accord with the purpose and policy of the Statute. The further question is then determined, whether there has been such change of position by the plaintiff that justice demands performance of the contract as though valid and enforceable at law.

Transfer of possession definitely indicating the contract is not insisted on in several states, where the plaintiff has seri-

29 *Supra* note 10. See other cases cited *supra* notes 9 and 10.

The possession cannot, of course, indicate the terms of the contract, but only that some contract to sell or lease exists. This amounts in fact to the absence of any other explanation, such as the continued possession of a tenant for years, tenant in common, licensee in actual occupation prior to the parol contract, occupation by an agent or servant, and the like. In addition to the cases above referred to see Epps v. Redfield, 69 Conn. 104, 36 Atl. 1011 (1897), [equivocal possession by promisor's mistress]; Koch v. Nat. Un. Bldg. Ass'n, 137 Ill. 497, 27 N. E. 530 (1891); Standard v. Standard, *supra* note 26; Brewer v. Wilson, 17 N. J. Eq. 180 (1864), [vendor remaining in possession of most of the property sold].

ously changed his position in reliance on the contract so that justice demands its enforcement. Thus in a New Jersey case[30] discontinuance by a wife of her action for divorce, and receiving her husband back on his confession and promises of reform, was held to require specific performance of his contract, in consideration of such settlement, to convey their home to her, though she occupied the house only as his wife as before, and therefore did not have possession, which was in him.

[30] Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227 (1892). In Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146 (1888) causing the dismissal by the plaintiff of several actions against the defendant in consideration of the defendant's parol promise to convey his farm to the plaintiff was held to require specific performance, though the plaintiff had not taken possession or made improvements. See also Sears v. Redick, 211 Fed. 856 (1914); Aldrich v. Aldrich, 287 Ill. 213, 122 N. E. 472 (1919), [Possession not essential if facts are clear]; Best v. Gralapp, 69 Neb. 811, 96 N. W. 641 (1903), 99 N. W. 837 (1904); Schutt v. Missionary Soc. Method. Ep. Church, 41 N. J. Eq. 115, 3 Atl. 398 (1886), 1 Williston, Contracts, § 494.

Continued possession by a tenant is sufficiently indicative of the contract when the tenant is induced by the contract to make improvements which would not be made by a tenant. Ordinary repairs or slight improvements are not enough, but extensive expenditures indicate a contract to sell or to renew. Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537 (1889); Brown v. Jones, 46 Barb. 400 (N. Y. 1866); Whiting v. Pittsburgh Opera H. Co., 88 Pa. 100 (1878).

An equivocal possession, shared with the vendor, rejected in the Maddison case and the Burns case, *supra,* has been held to be good where the change of position was such that justice demanded specific performance. See Lamb v. Hinman, quoted *supra,* note 7. The court also said: "Complainant abandoned one home and made a new one in reliance upon the oral contract; occupied the land bargained for and cultivated it for six years in confidence that the contract would be performed; and it is not too much to say that the whole course of his subsequent life was probably changed in consequence. To deny relief under such circumstances for no other reason than that he did not occupy exclusively, *would be to make the whole case turn upon a point in itself unimportant as affecting the real equities.*" In Bushnell v. Rowland, 118 Mich. 618, expenditures for improvements was held to be sufficient though the purchaser occupied jointly with the vendor. If possession is actually given the purchaser, keeping the vendor as a boarder or lodger does not make the purchaser's possession equivocal, and specific performance will be given. Woodbury v. Gardner, 77 Me. 68 (1885); Ayres v. Short, 142 Mich. 501, 105 N. W. 1115 (1905).

If the vendor is estopped in any of these cases to deny the validity of his contract, equity enforces it, not because it is valid under the Statute, but in spite of its invalidity, because of the estoppel. The requirement of possession as laid down in Burns v. McCormick, *supra,* is in no way forced upon equity by any controlling principle. It is simply a rule of expediency that the policy of the Statute may be protected by eliminating the danger of fraud. It is submitted that in such cases as Barbour v. Barbour, *supra,* where the facts were admitted and no danger of fraud existed, there is no occasion or purpose in applying the rule of possession now generally insisted on in the usual case, as in the Maddison case and the Burns case, discussed above. Insistence upon a transfer of possession in recognition of the policy of the Statute is little more than a gesture which may well be dispensed with where important equities in the purchaser demand protection by specific performance, where there is no uncertainty as to the facts.

§ 83. **Contracts in Consideration of Marriage.** The Statute makes contracts in consideration of marriage unenforceable unless in writing.[31] It is settled law that the contracting of the marriage in reliance upon the parol contract made before the marriage is not "part performance" which takes the case out of the Statute.[32] This makes clear that it is not "part performance" which causes equity to enforce parol contracts falling within the Statute, but rather the protection and enforcement of equities arising from acts done by the plaintiff in reliance upon the contract with the consent and cooperation of the defendant. The plaintiff may have relied upon the con-

31 § 77, *ante.*

32 Montacute v. Maxwell, 1 P. Wms. 618, 620, 24 Eng. Rep. 541 (1720); Lassence v. Tierney, 1 Macn. & G. 551, 557, 41 Eng. Rep. 1379 (1849), [Lord Cotenham saying: "A parol contract, followed only by marriage, is not to be carried into effect, marriage being no part performance of the contract. If it were, there would be an end of the statute."]; Caton v. Caton, L. R. 1 Ch. App. 137 (1866); Keady v. White, 168 Ill. 76, 48 N. E. 314 (1897); Deshon v. Wood, 148 Mass. 132, 19 N. E. 1 (1888); Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. 810 (1893); Hunt v. Hunt, 55 App. Div. 430, aff'd 171 N. Y. 396, 64 N. E. 159 (1902); Hackney v. Hackney, 8 Humph. 452 (Tenn. 1847). See Pound, Progress of the Law (1920), 33 Harv. L. Rev. 937–939; 36 Cyc. 649, n. 28.

tract in contracting the marriage, but the Statute definitely makes the contract unenforceable in that very situation, and equity has no purpose, in this or any of the other situations heretofore discussed, to repeal the Statute by judicial legislation. But where, after the marriage, the wife had entered and made improvements with the consent of her husband, the same principle of estoppel applies as in similar situations under parol contracts to purchase land, and the contract is enforced for the same reasons.[33] Where the husband is guilty of fraud, inducing the marriage by promising immediate execution of the conveyance, though intending at the time to make no conveyance, proved by a conveyance to another at about the same time, it has been held that justice demands specific performance against him, though the plaintiff was not in legal possession.[34]

§ 84. **Statute Does Not Apply to Promise to Pay Purchase Price Where Vendor Has Conveyed Land.** Where the vendor actually conveys the land to the purchaser in consideration of his promise to pay the purchase price the Statute of Frauds has no application, as the deed satisfies the statutory requirement respecting conveyances of land, and there is no requirement that the promise to pay the price be in writing. The same situation exists when a parol contract to sell is actually performed by the vendor by delivery of a deed to the vendee. Though the Statute applied to the executory contract, it has no longer any application when the land has been conveyed according to its terms. The promise to pay the purchase price

[33] Allen v. Moore, 30 Colo. 307, 70 Pac. 682 (1902), *ibid.* 26 Colo. 197, 57 Pac. 698 (1899). Prof. Cook points out that these facts of possession and improvements appear in the report, 26 Colo. *supra*, 2 Cook, Cas. Eq., 423 n. See also White v. Ingram, 110 Mo. 474, 19 S. W. 827 (1892), [possession and improvements on faith of promise, after the marriage].

[34] Peek v. Peek, 77 Cal. 106, 19 Pac. 227 (1888); Green v. Green, 34 Kan. 740, 10 Pac. 156 (1886). This line of cases goes back to Mullet v. Halfpenny, Prec. Ch. 404 (1699), S. C. Halfpenny v. Mullet, 2 Vern. 373, 23 Eng. Rep. 836 (1699), in which the Chancellor enforced a promise to give a marriage portion, which the defendant had not signed, but where he had helped to bring about the marriage of the plaintiff with his daughter in the belief that the contract was acceptable to him. See discussion of this line of cases, Pound, Progress of the Law (1920), 33 Harv. L. Rev. 937–939.

then becomes enforceable without the aid of the doctrine of "part performance," since it no longer comes within the Statute's prohibition.[35]

§ 85. Parol Contracts to Give a Mortgage on Land. A parol contract to give a mortgage to secure a loan or other credit actually given to the promisor in reliance on the promise, or an agreement that certain property shall be security for the payment of such loan or other indebtedness where the loan is made or the credit is given in reliance on such promise, results in an equitable mortgage enforceable in equity, except as against a purchaser for value without notice, like a legal mortgage executed in due form.[36] The reason is that the person making the loan or giving the credit does so relying on the promise that he shall have the security which a lien on the property will give him, and if equity refuses to act his relief at law will be that of any unsecured creditor. He is entitled to the specific thing, the security, which was promised him, and relying on which he made the loan or gave the credit which is the basis of his equitable right. An executory contract to borrow money and to give a mortgage to secure the loan when made will not

35 See 1 Williston, Contracts, § 493; Worden v. Sharp, 56 Ill. 104 (1870); Knight v. Collings, 227 Ill. 348, 81 N. E. 346 (1907); Wetherbee v. Potter, 99 Mass. 354 (1868), [by Wells, J., at 362, declaring the rule that though the Statute applied before the conveyance by the vendor it ceased to apply thereafter]; Birch v. Baker, 85 N. J. L. 660, 90 Atl. 297 (1913); Malzer v. Schisler, 67 Ore. 356, 136 Pac. 14 (1913); Washington v. Soria, 73 Miss. 665, 19 So. 485 (1896), [contract enforced in such case though doctrine of "part performance" is rejected in Mississippi]. See list of cases (1913), 51 L. R. A. (N. S.) 77. See 1 Ames, Cas. Eq. 278, n. 4, arguing that because the conveyance by the plaintiff of land in part payment for land to be conveyed by the defendant was not such part performance as would take the case out of the Statute, therefore the vendor should not be able to recover the price on the oral contract after full performance by him, and citing several English cases as settling the law to that effect in England. See additional cases cited by him in accord with the American cases above cited. The position taken in Fisher v. Wilson, 18 Ind. 133 (1862) followed by Liddle v. Needham, 39 Mich. 147 (1878), that the only action maintainable was on the implied promise arising from the vendor's performance which did not come under the Statute, not on the express promise which did, seems to have been a mistake.

36 See § 62, notes 42, 44, 45, *ante*.

be specifically enforced, since the mortgage on the land is an incident of the loan only, and a contract for a loan will not be enforced in equity.[37] These cases of equitable mortgages have nothing to do with the doctrine of part performance under the Statute of Frauds. Whether the promise to give a mortgage or that the property shall be security is in writing or not, it is the actual making of the loan or the giving of credit which creates the equitable mortgage, and the equity of the equitable mortgagee is exactly the same whether the agreement is in writing or not.[38]

37 See § 62, note 46, *ante*.

38 See § 62, notes 42, 44, 45, *ante*.

CHAPTER XVII

THE VENDOR-PURCHASER RELATION

§ 86. The Property Rights of Vendor and Purchaser; Rights of Heirs and Devisees. A valid contract for the sale of land enforceable by specific performance gives the purchaser an equitable estate in the land, the vendor holding the legal title as trustee for the purpose of conveying the property according to the contract, and as mortgagee for the purpose of securing payment of the purchase money. The vendor-purchaser relation, involving these important changes in the interests of the parties, arises out of the right to specific performance which one has against the other, and where that right does not exist the relation does not arise.[1] On the death of the purchaser prior to the transfer of title under the contract, his equitable estate passes either to his devisees or devisee under his will, or to his heirs if he dies intestate, subject to the lien of the vendor as mortgagee in equity for payment of the purchase price,[2] the personal representative being required to pay the purchase money out of the personal estate of the purchaser.[3] The pur-

1 See cases in notes following.

2 Seton v. Slade, 7 Ves. 265, 32 Eng. Rep. 108 (1802); Sutherland v. Harrison, 86 Ill. 363 (1877); House v. Dexter, 9 Mich. 246 (1861), [the court saying: "The land in equity belongs to the vendee, and may be sold, devised or encumbered by him; and on his death it descends to his heirs, who take it subject to the rights of the vendor under the contract"]; Downing v. Risley, 15 N. J. Eq. 93 (1862); Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825 (1895); Riegelman's Est., 174 Pa. 476, 34 Atl. 120 (1896).

3 See Milner v. Mills, Sutherland v. Harrison and Riegelman's Est., *supra* note 2, also Downing v. Risley, 15 N. J. Eq. 93 (1862), the court holding that the personal representative should be made a party, though the heirs had offered to pay the full purchase price, because the equitable estate might be needed to pay the deceased purchaser's debts if his personal property should be insufficient. Where the vendee had paid in full for the property, the personal representative is not a necessary party. McKay v. Broad, 70 Ala. 377 (1881); Healey v. Simpson, 113 Mo. 340, 20 S. W. 881 (1892).

chaser's widow is entitled to dower in the property, subject to the vendor's rights as mortgagee, the heirs or devisees taking subject to her dower.[4]

If the vendor dies pending performance of the contract, whether before or after the day fixed for closing, his legal title as trustee passes to his heirs or devisees, as the case may be, subject to the trust in favor of the purchaser, his heirs, devisees or assigns, and the dower right of his widow. In other words no beneficial right therein passes to the heirs or devisees of the vendor and his widow has no right of dower.[5] He dies the owner of a chose in action for the purchase money, which passes as personal property to his executor or administrator for the benefit of his legatees or next of kin, secured by the legal title which he held as mortgagee, and which his heirs or devisees hold on his death for the benefit of the legatees or next of kin.[6]

4 Williams v. Kinney, 43 Hun (N. Y. 1887); Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921 (1889); Tink v. Walker, 148 Ill. 234, 35 N. E. 765 (1893); Reed v. Whitney, 72 Mass. 533 (1856), and other cases cited, Walsh, Property (2d Ed.), 175 n. 5. See N. J. Laws of 1927, c. 68, modifying dower in both legal and equitable estates.

5 Bubb's Case, Freem. Ch. 38, 22 Eng. Rep. 1044 (1678), 1 Ames, Cas. Eq. 194; Farrar v. Winterton, 5 Beav. 1, 49 Eng. Rep. 476 (1842); Stewart v. Griffith, 217 U. S. 323 (1910); Coles v. Feeney, 52 N. J. Eq. 493, 29 Atl. 172 (1899); Williams v. Haddock, *supra* note 2; Bender v. Luckenbach, 162 Pa. 18, 29 Atl. 296 (1894). See cases in notes immediately following.

6 In Moore v. Burrows, 34 Barb. 173 (N. Y. 1861), the court described the interest of the deceased vendor as "personal property, like a bond and mortgage, and goes to his personal representatives. . . . The heirs took the title by descent as a mere security in equity for the payment of the debt." A valid contract to sell transfers equitable title to the purchaser, and a devise thereof by the vendor's will cannot operate on his death, the right to the purchase money passing as personal property to his executor or administrator for distribution. Mayer v. Gowland, Dick. 563, 21 Eng. Rep. 389 (1779); Walton v. Walton, 7 Johns. Ch. 258 (N. Y. 1823), [Chancellor Kent saying: "A valid contract, for the sale of lands devised, is as much a revocation of the will in equity, as a legal conveyance would be at law. The estate, from the time of the contract is considered as the real estate of the vendee." In Coles v. Feeney, *supra* note 5, in an action by the executors of the deceased vendor to compel the purchaser to perform his contract, the court held that the devisees under the will of the vendor to whom the property was devised should be joined so they might be compelled to convey to the defendant. "In contemplation of equity the title to the property vested in the purchaser as soon as the contract was executed and delivered, subject, however, to

It is clear, therefore, that the contract results in a transformation of the vendor's interest corresponding to the interest created by it in the purchaser.

Where an option to purchase is exercised after the death of the vendor, his heirs or devisees are entitled to the purchase money, as the property passed to them as realty on the vendor's death, because an option is not a contract to sell which may be specifically enforced, and therefore the vendor-purchaser relation does not arise until the exercise of the option after the vendor's death. The contract to sell then arises, binding the heirs or devisees to convey to the purchaser, and as the land passed to them subject to the option, they are entitled to the purchase money, not the personal representative.[7]

a lien in favor of Mrs. Coles for the unpaid purchase money; and that lien is capable of being enforced by her executors against the specific devisees of the particular land . . . by compelling the purchaser to pay to the executors the purchase money.''

In some of the states statutes provide that the personal representation may convey the legal title in such cases to the purchaser, making it unnecessary to join the heirs or devisees. Griffith v. Stewart, 31 App. D. C. 29 (1908), aff'd 217 U. S. 323 (1909); Md. Code, 1911, Art. 93, § 81; Kan. Rev. Stat. (1923), 22–827; 2 Cook, Cas. Eq. 558 n. See Iowa Code, §§ 2487–88; Tex. Act, Feb. 2, 1844; Wis. Rev. St., 1898, §§ 3501, 3907; 36 Cyc. 766.

If the purchaser defaults the executor or administrator may foreclose the contract and thereafter sell the land, administering the proceeds as part of the deceased vendor's personal estate. Clapp v. Tower, 11 N. D. 556, 93 N. W. 862 (1903); 2 Cook, Cas. Eq. 558, citing Williams v. Haddock, *supra* note 2. In Curre v. Bowyer, 5 Beav. 6, n., 49 Eng. Rep. 478 (1819), 1 Ames, Cas. Eq. 196, where the purchaser forfeited the contract the land went to the next of kin of the vendor. If the vendor has a defective title which makes specific performance unenforceable by him and the purchaser rejects the title for that reason after the vendor's death, no equitable conversion existed, and the land descends to his heirs or passes to his devisees. Thomas v. Howell, 34 Ch. D. 166 (1886). Suppose the purchaser elects to take the defective title, or enforces specific performance with compensation? See *post* note 11.

7 Smith v. Lowenstein, 50 Oh. 346, 34 N. E. 159 (1893), 2 Cook, Cas. Eq. 571 [reviewing Lawes v. Bennett, 1 Cox 167, 29 Eng. Rep. 111 (1785), holding that the purchase money went to the executor, not to the heir or devisee; critized but followed by Lord Eldon in Townley v. Bedwell, 14 Ves. 591, 33 Eng. Rep. 648 (1808), rents belonged to heir until exercise of the option by tenant, thereafter rents and purchase money to executor; criticized and limited in Edwards v. West, 7 Ch. D. 858 (1878); Graves v. Graves, 15 Ir. Ch. 357 (1864), and

Where a valid contract to sell exists at the vendor's death his heirs or devisees are entitled to possession or to the rents and profits during the interval before conveyance to the purchaser, just as the vendor would have been had he lived, so that the personal representative is not entitled to such rents and profits, though he receives the purchase money on the closing of the contract of sale.[8] The vendor-purchaser relation involves retention of possession and all rights of beneficial enjoyment, including rents and profits, by the vendor, his heirs or devisees, until the conveyance of the legal title to the purchaser.

Where the vendor has no title it is clear that the vendor-purchaser relation does not exist as specific performance is im-

In re Marley, [1915] 2 Ch. 264, holding that the option contract does not work a conversion until it is exercised]; Ingraham v. Chandler, 179 Iowa 304, 161 N. W. 434 (1917); Caldwell v. Frasier, 65 Kan. 24, 68 Pac. 1076 (1902); Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 97 N. E. 43 (1911), [the court saying: "In the case before us no conversion was intended unless the option was exercised, and the conversion was contingent, for it depended wholly upon a future event which might or might not happen. . . . Upon this theory the heirs would take the land and enjoy it as land, just as the heirs in this case have done, until the contingency became a certainty by the exercise of the option when they would take the purchase money instead of the land, precisely as their ancestor would have done had he survived until that time"]; Richardson v. Hardwick, 106 U. S. 252 (1882). See Thomas v. Heddon, 186 Ind. 48, 114 N. E. 218 (1916), [reviewed (1917), 26 Yale L. J. 508]; Stone, Equitable Conversion by Contract (1913), 13 Col. L. Rev. 369, 374. "There are *dicta* that the holder of an unexercised option is equitable owner—that there is a conversion subject to reconversion if the option is not exercised. Keep v. Miller, 42 N. J. Eq. 100, 107, 6 Atl. 495 (1886); House v. Jackson, 24 Ore. 89, 99, 32 Pac. 1027 (1893); Kerr v. Day, 14 Pa. 112, 114 (1850); McKay v. Carrington, 1 McLean (U. S.), 50, 54 (1829). If this were so an option contract would create a present equitable ownership and hence an indefinite option could not be held to infringe the rule against perpetuities. But it cannot be so. 'It is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified.' Kindersley, V. C., in Ranelagh v. Melton, 2 Drew. & Sm. 278, 281–282 (1864)," Pound, Progress of the Law (1920), 33 Harv. L. Rev. at 826, n. 59.

[8] Lumsden v. Fraser, 12 Sim. 263, 59 Eng. Rep. 1132 (1841); Townley v. Bedwell, *supra* note 7.

possible. But where the title is so defective, or the quantity or quality of the land is so substantially short of what the contract calls for that the purchaser may reject the title and rescind, or enforce specific performance with compensation, as explained heretofore,[9] does the vendor-purchaser relation exist before the purchaser elects, so that if such election takes place after the vendor's death instead of before, the property is to be regarded as belonging to the purchaser and the purchase money to the vendor and to his personal representative on his death? If the purchaser dies prior to the date of closing, will this right to enforce specific performance with or without compensation pass to his heirs as realty or to his personal representative as a personal chose in action? The vendor's right to rescind because of a breach by the purchaser does not prevent the vendor-purchaser relation from arising, and the land may be sold by the vendor's personal representative after the purchaser's repudiation of the contract, or after foreclosure of his rights under the contract.[10] Even if the purchaser had broken his contract before the vendor's death, so that the vendor had an election between specific performance and rescission, there can be no doubt that the result must be the same. The equitable interest of the purchaser cannot be regarded as disappearing and reappearing as the purchaser breaches the implied condition of performance and the vendor waives such breaches. It would seem to follow that a similar right of election in the purchaser on the vendor's breach should have no different effect. The vendor-purchaser relation exists, therefore, not only where the purchaser accepts the title before the vendor's death, establishing his election, but up to the time when he elects to rescind after the vendor's death. He has the right to the specific land to the extent that the vendor can convey it to him, which is of the essence of the vendor-purchaser relation, the deduction from the purchase price being the adjustment of his right to damages at law in the equity action so as to settle the entire controversy in one suit.[11] In the few cases of this kind where

9 See § 76, *ante*.

10 See *supra* last paragraph of note 6.

11 See § 76, *ante*. In Thomas v. Howell, *supra* note 6, the court held that no equitable conversion results in the case considered because no enforceable contract exists; that partial enforcement with compensation is not enforcement of the con-

equity refuses specific performance because of the hardship involved, the vendor-purchaser relation does not exist because the right to specific performance is lacking.

§ 87. Effect of Vendor's Conveyance to a Third Person. The equitable estate of the purchaser remains uneffected by a conveyance to a third person unless he is a purchaser for value without notice of the purchaser's interest. Therefore the purchaser may compel such person to convey the property if he is not an innocent purchaser for value.[12] If he is a purchaser for

tract but something else. It is submitted that this position is not in accord with the principles on which specific performance with compensation is enforced. In Pickens v. Campbell, 104 Kan. 425, 179 Pac. 343 (1919), failure of the purchaser to pay an instalment under an instalment contract for the purchase of land was held to be a breach of a condition precedent, at the time of the vendor's death, so that the vendor-purchaser relation did not then exist, the land passed to his heirs, and the contract was not part of his personal estate. Though such payments are express conditions precedent at law under the Kansas doctrine, failure to pay them are clearly conditions subsequent in equity, involving forfeiture of the equitable estate arising out of the contract before breach, according to the prevailing law. See § 74, *ante*. Therefore the vendor-purchaser relation exists in such cases according to the prevailing law. The right to rescind an existing contract of sale because of a breach is a situation entirely different from an option contract where no contract of sale arises until the option is exercised. The better view is that the vendor-purchaser relation exists in these cases where a breach has occurred on either side, subject to be ended when rescission takes place, not before.

Supporting the position in Thomas v. Howell, *supra*, the heirs of the purchaser were denied specific performance with compensation in Green v. Smith, 1 Atk. 572, 26 Eng. Rep. 360 (1738), and Broome v. Monck, 10 Ves. 597, 32 Eng. Rep. 976 (1805). See, *contra*, Garnett v. Acton, 28 Beav. 333, 54 Eng. Rep. 394 (1860), the heirs being given specific performance after the vendor had cleared up his title following the purchaser's death. The vendor-purchaser relation must have existed, therefore, at the purchaser's death, due to his right to enforce specific performance with compensation. To same effect, Hudson v. Cook, L. R. 13 Eq. 417 (1872). The last three cases are referred to in Durfee, Cas. Eq. 735 n.

[12] In Haugwout v. Murphy, 22 N. J. Eq. 531 (1871), in an action to compel the subsequent purchaser to convey, the court said: "If the vendor should again sell the estate of which, by reason of the first contract, he is only seised in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. . . . Or the second purchaser, if he have notice at the

value without notice the subsequent purchaser holds the land free of the prior purchaser's equitable estate, which, like all other equities, is cut off under the equitable rule.[13] In that event the original purchaser may hold the vendor for breach of contract at law or compel him to account for the purchase price on the resale as trustee.[14]

time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser." (Citing cases). To same effect see Jennings v. Moore, 2 Vern. 609, 23 Eng. Rep. 998 (1708); Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447 (1888); Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197 (1908); Chicago, etc., R. Co. v. Hay, 119 Ill. 507, 10 N. E. 34 (1887); Wilson v. Emig, 44 Kan. 125, 24 Pac. 80 (1890); White v. Mooers, 86 Me. 62, 29 Atl. 936 (1893); Mansfield v. Hogdon, 147 Mass. 304, 17 N. E. 544 (1888); Farwell v. Johnston, 34 Mich. 342 (1876); Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139 (1907); Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921 (1889); Laverty v. Moore, 33 N. Y. 658 (1865); Veeder v. Horstmann, 85 App. Div. 154, 83 N. Y. Supp. 99 (1903); White v. Patterson, 139 Pa. 429, 21 Atl. 360 (1891). See long list of cases cited 36 Cyc. 761.

That this principle applies to contracts other than for the sale of land where specific performance may be enforced against the original vendor, see 36 Cyc. 762, n. 69, citing Andrews v. Brown, 57 Mass. (3 Cush.) 130 (1849), contract to sell a vessel, and Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 115 N. W. 988 (1908).

13 The payment of a part of the purchase price by the second purchaser and the giving of a mortgage for the balance, notice being received thereafter before the mortgage became due, does not establish the defense of purchaser for value without notice in England. In many American states specific performance will be enforced against him, on condition that he be indemnified for payments made. See cases in note to Basset v. Nosworthy, 2 Lead. Cas. Eq. 1. referred to in Haugwout v. Murphy, *supra.*

Contracts for the sale of land do not come under the recording acts in most of the states, and though they may be recorded so that a subsequent purchaser searching the title will probably have actual notice, their record creates no constructive notice. N. Y. Real Prop. L. §§ 290, 294; Boyd v. Schlesinger, 59 N. Y. 30 (1874). In some states they must be recorded, and their record is constructive notice to a subsequent purchaser. Kent v. Williams, 146 Cal. 3, 79 Pac. 527 (1905); Walsh, Property (2d Ed.), 769. See also Conaway v. Sweeney, 24 W. Va. 643 (1884). Possession by the purchaser is notice of his interest to a subsequent purchaser. See Walsh, Property (2d Ed.), 771, 772.

As to the doctrine of purchaser for value without notice, see *supra* § 19. See cases in preceding note in most of which this doctrine is recognized.

14 See Haugwout v. Murphy and other cases cited, *supra* note 12.

§ 88. **Assignment or Sale by Purchaser.** The purchaser may assign his rights under the contract or execute a deed conveying his interest in the land, the result in each case being the transfer to the assignee or grantee of the original purchaser's equitable estate, so that he acquires the same right to enforce the contract by specific performance, which the original purchaser had.[15] The assignee must, of course, complete the performance of the purchaser's contract so far as it remains unperformed in order to secure specific performance, paying the balance of the purchase price. If the contract calls for the giving of the original assignor's notes for part of the purchase money, the assignee cannot substitute notes signed only by himself if the vendor requires the notes of the purchaser. The personal responsibility of the purchaser is of the essence of the contract and it is not performed by tendering the notes of the assignee or of anyone else.[16] By weight of authority, if the balance of the purchase price over cash to be paid on the delivery of the deed is to be secured by the purchaser's bond

15 Fitzhugh v. Smith, 62 Ill. 486 (1872); Fuller v. Bradley, 160 Ill. 51, 43 N. E. 732 (1895); Ricker v. Moore, 77 Me. 392 (1885); Hollander v. Central Metal &c. Co., 109 Md. 131, 71 Atl. 442 (1908); Robbins v. McKnight, 5 N. J. Eq. 642 (1847). Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922). See also cases in notes following.

In Vigars v. Hewins, 184 Iowa 683, 169 N. W. 119 (1918), the purchaser borrowed money to pay the purchase price from a third person under an agreement that the lender should have the purchaser's interest under the contract as security. A judgment was docketed against the purchaser prior to the making of the contract to purchase. The court held that an equitable mortgage existed securing the loan which was prior to the lien of the judgment on the purchaser's equitable interest. See Iowa cases cited *post* note 26.

16 Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894), 2 Cook, Cas. Eq. 517. That the assignee must perform exactly as the assignor would be required to perform, in order to be given specific performance see also Mugridge v. Wass, 128 Mass. 394 (1880); McCarthy v. Couch, 37 Minn. 124, 33 N. W. 777 (1887), [contract to sell by first purchaser not an assignment, and gave no right to second purchaser to enforce first contract.] An assignee of a part of the land, under a contract to sell part, must pay the entire purchase price to get specific performance as the contract cannot be enforced in segments, and the entire land is held as security for the purchase price by the vendor. Hoover v. Baugh, 108 Va. 695, 62 S. E. 968 (1908). See also Owen v. Frink, 24 Cal. 171 (1864); Stone v. Pratt, 25 Ill. 16 (1860).

and a mortgage on the property, the bond and mortgage of the assignee is sufficient performance, as the personal responsibility of the purchaser is not of the essence. The vendor relies on the security of the mortgage rather than on the personal liability of the purchaser on the bond or note which the mortgage secures.[17]

A situation frequently arising is an option to purchase given to a tenant in a lease to be exercised as therein provided. An assignment of the lease carries with it the option, and on its exercise by giving the required notice of acceptance the assignee acquires the right to compel specific performance of the resulting contract to sell. An assignment of the option transfers no

[17] Montgomery v. De Picot, 153 Cal. 509, 96 Pac. 305 (1908), 36 Cyc. 760, the court saying: "The mortgage is the main thing relied on, and when a substantial prior payment, as in this case, is made on the purchase price, the financial responsibility of the vendee, on the note itself evidencing the debt for the balance, is a matter of very little importance to the vendor. . . . It is a very easy matter, when reliance is intended to be placed on the financial responsibility of the original vendee, to specify in the contract that, in addition to the mortgage, his personal obligation shall be given. When this is not done, and a mortgage to secure 'a promissory note' is alone called for, as in the contract here, such provision will be construed as making the giving of a mortgage, not the giving of a note, the material inducement of the contract."

In Muller v. Raskind, 100 N. J. Eq. 258, 135 Atl. 682 (1926), a bond and mortgage was to be given by the purchaser to the vendor for $12,500, out of a total purchase price of $15,500. The court held that the vendor could not be required to accept the bond of the purchaser's assignee, recognizing that the question had not been squarely decided in New Jersey, and leaving the final solution to the court of errors and appeals. The court says that decisions in other states are not uniformly to the contrary. To same effect, Kitchinski v. Thompson, 101 N. J. Eq. 649, 659.

In New York the only decision seems to be Logo Realty Co. v. Johnson, 227 App. Div. 292, 237 N. Y. Supp. 460 (1929), the First Department holding that the vendor need not accept the assignee's bond and mortgage. The only authority in point cited by the court is Houchin v. Salyards (Minn.), 133 N. W. 48, and the prevailing opinion contains no analysis of reasons. The dissenting opinion by Judge Proskauer, concurred in by Chief Justice Dowling, follows Montgomery v. De Picot, *supra*, stresses the general practice to accept the assignee's bond and mortgage, and argues that as the contract is with the purchaser and his assigns, the assignee's bond satisfies the contract.

equitable estate, which arises in the assignee only when the option is exercised and a valid contract to sell arises.[18]

A contract to sell the land by the purchaser on terms differing from the terms of the original contract does not amount to an assignment, as is a deed conveying the purchaser's interest. It is simply a contract to sell the land, and he may therefore sue for specific performance in his own name in order to get title so that he may perform the contract with his vendee.[19]

An express provision that the contract shall not be assigned without the consent of the vendor is governed by the general rules of law applying to similar restrictions against alienation in deeds. An absolute restraint upon assignment is void. The assignment is valid as a transfer of the purchaser's equitable estate, though forbidden by the contract, the assignee taking subject to defenses good against the assignor, including possible forfeiture because of the assignment if expressly provided for, in cases where the restriction is so limited and reasonable as not to be void as contrary to public policy.[20]

18 Perkins v. Hadsell, 50 Ill. 216 (1869); House v. Jackson, 24 Ore. 89, 32 Pac. 1027 (1893). [Statement in the opinion that the original tenant was "equitably the owner" of the property before the option was exercised is an error, as the vendor-purchaser relation does not arise until the contract to sell arises on exercise of the option. See *supra* note 7]; Napier v. Darlington, 70 Pa. 64 (1871).

That the equitable estate does not arise in the tenant's assignee until the exercise of the option, so that if he dies before that time the leasehold with the option as an incident passes as personalty to the personal representative, the option enforceable for the benefit of the next of kin, not the heir, see *In re* Adams &c. 27 Ch. D. 394 (1884); Gustin v. Union School Dist., 94 Mich. 502, 54 N. W. 156 (1893).

19 Bittrick v. Cons. Imp. Co., 51 Wash. 469, 99 Pac. 303 (1909). In Lenman v. Jones, 222 U. S. 51 (1911), the purchaser, after making a contract to sell the same land, executed a deed to her vendee, thereby conveying her equitable estate to him as effectively as a formal assignment of her contract would have done. See Thompson v. Justice, 88 N. C. 269 (1883), in which a mortgagee of the purchaser's interest was protected.

20 Hull v. Hostettler, 224 Mich. 365, 194 N. W. 996 (1923), [declaring that a general restriction against alienation would be void; that the assignment was valid though violating a valid restriction, and no forfeiture could be enforced therefor because none was reserved and the court would not imply it]; Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14 (1898), [provision that any assignment must be countersigned by vendor to secure him in getting purchase price, and full amount due was tendered by as-

§ 89. **Liabilities of the Assignee.** The transfer to the assignee of the purchaser's equitable estate does not make him liable to pay the balance of the purchase price to the vendor until he has elected by some definite action to enforce the contract against the vendor. Before such election he is in the position of the holder of an option on the property. The purchaser could not assign his obligation, and no new obligation arises on the assignment unless the assignee expressly assumed or promised to pay the balance due under the contract.[21] But when he takes definite action to enforce the contract, as by starting an action for specific performance,[22] or by making a tender and demanding a conveyance,[23] he becomes bound per-

signee]; Griggs v. Landis, 21 N. J. Eq. 494 (1870), [assignee given specific performance though assignment violated stipulation of contract, because purpose was to enforce provision for improvements to be made by purchaser, and this had been fully met by assignee]. That the assignment is good subject to vendor's defenses see also Cowart v. Singletary, 140 Ga. 435, 79 S. E. 196 (1913), and Thomassen v. De Goey, 133 Iowa 278, 110 N. W. 581 (1907), and other cases cited, Durfee, Cas. Eq. 727 n.

21 Comstock v. Hitt, 37 Ill. 542 (1865). [The assignee is in the position of a purchaser who takes subject to a mortgage without assuming it]; Corbus v. Teed, 69 Ill. 205 (1873). In Epstein v. Gluckin, *supra* note 15, the court, in holding that the assignee may enforce specific performance though the vendor could not have maintained a similar action against him before his election to enforce the contract, and in repudiating the doctrine of mutuality of remedy, definitely recognized the rule that the assignee incurs no liability before electing to enforce the contract. See list of New York cases cited for this rule in H. & H. Corp. v. Broad Holding Corp., *post* note 23, also Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928); Meyer v. Droegemueller, 165 Minn. 245, 206 N. W. 391 (1925); Midland Co. Sav. B. v. T. C. Prouty Co., 158 Mich. 656, 123 N. W. 549 (1909).

22 Epstein v. Gluckin, *supra* note 21.

23 H. & H. Corp. v. Broad Holding Corp., 204 App. Div. 569, 198 N. Y. Supp. 763 (1923). Language in the opinion to the effect that the discredited doctrine of mutuality of remedy is the reason for allowing the vendor specific performance against the assignee is corrected, apparently, by what follows, the court basing its decision on the fact that the assignee had exercised his option by making a tender to the vendor and demanding a conveyance. A request for an extension of time to close the contract does not amount to an election by the assignee to assume liability on the contract. Langel v. Betz, *supra* note 21.

Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237 (1918), holds, *contra* to Epstein v. Gluckin, *supra* note 15, that the assignee cannot maintain

sonally to carry out the purchaser's side of the contract. On exercising his option to enforce the contract as owner of the purchaser's equitable estate, he becomes obligated to perform the contract as purchaser.

§ 90. **Assignment of Contract or of Rights Thereunder by Vendor.** Where the vendor takes the purchaser's notes for deferred installments of the purchase price prior to the transfer of title under the contract, and later assigns these notes or in any other way transfers to an assignee his rights under the contract, the assignee is in the position of an assignee of a debt secured by a mortgage.[24] As put by a Tennessee court: "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of the debt, and a legal title retained to secure the payment of a debt. In both cases courts of Chancery consider the estate only as security for the payment of the debt, upon the discharge of

specific performance because of the doctrine of mutuality of remedy. That there is no validity in that doctrine ought to be very clear in the light of the situation existing in this case. That the purchaser has an equitable estate which he can assign or devise, and which passes to his heirs if he dies intestate is settled law in Illinois as elsewhere. But the equitable estate arises out of the right to specific performance, and the assignee's right to the land is gone if he cannot maintain that action. Judge Cardozo makes clear the absurdity of the position of the Illinois court when he says, (Epstein v. Gluckin, *supra* note 15), "Equity, while recognizing his right, will not leave him powerless to vindicate it, by withholding the equitable remedies without which the right is ineffective. The anomoly is not presented of a trust which equity establishes, but refuses to enforce."

[24] Tanner v. Hicks, 4 Sm. & M. 264 (Miss. 1845); Walker v. Kee, 16 S. C. 76 (1881); Graham v. McCampbell, Meigs, 52 (Tenn. 1838); Hanna v. Wilson, 3 Grat. 243 (Va. 1846); Gentry v. Gentry, 87 Va. 478, 12 S. E. 966 (1891).

In Brush v. Kinsey, 14 Ohio 20 (1846), the court held *contra* treating the vendor as absolute owner until the purchase price was paid in full, and therefore refusing to recognize the vendor-purchaser relation. In Jaeger v. Hardy, 48 Ohio 335, 27 N. E. 863 (1891), the court fully recognizes the vendor-purchaser relation, declaring that the "vendee has an equitable estate in the land" and is not bound by the record notice of a subsequent mortgage made by the vendor. But when he has actual notice of such mortgage he must withhold further payments to the vendor, as the lien of the mortgage covers the balance due to the vendor on the purchase price.

which, the debtor is entitled to a conveyance in the one instance and a reconveyance in the other."[25] Just as the assignment of the debt carries with it the mortgage which secures its payment, so also the assignment of the obligation to pay the purchase price, in the form of notes or otherwise, carries therewith the vendor's rights of security in the land, title to which is retained by him as such security.[26] The enforcement of this

[25] Graham v. McCampbell, *supra* note 24. The court disposed of the difficulty arising out of cases holding that mere liens such as those of judgment creditors, innkeepers, common carriers and artisans are personal and cannot be assigned, by distinguishing cases of mortgages and these cases of vendors in which the legal title is held as security, quoting Judge Story in Conrad v. Atl. Ins. Co., 26 U. S. (1 Pet.) 441 (1828): "It is true, that in the discussions of the courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law; it does not consider the estate of the mortgage as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose sense that it is sometimes called a lien and then only by way of contrast to an estate absolute and indefeasible." For the effect of the merger of law and equity in the law of mortgages, and how mortgages pass with the assignment of the debt, both at law and in equity in "lien" states, and in equity in "common law" states, see § 24, *ante*, particularly notes 26–29, and text to which they refer.

[26] In Jaeger v. Hardy, *supra* note 24, a mortgage of the land by the vendor was treated as an assignment by way of security of the balance due on the purchase price from the purchaser. To same effect, D'Wolf v. Pratt, 42 Ill. 198 (1866); Dickey v. Lyon, 19 Iowa 544 (1865). In O'Brien v. Evans, 107 Mich. 623, 65 N. W. 571 (1895) *contra*, the court says, though the parties may intend that a deed will transfer the vendor's right to the balance of the purchase price, that result does not necessarily follow. In Moyer v. Hinman, 13 N. Y. 180 (1855), after the plaintiff purchaser had taken possession under an instalment contract, a judgment was recovered against the vendor and the land was sold on execution, defendant getting title by the sheriff's deed. Thereafter, without actual notice of the deed to defendant, the plaintiff made further payments under his contract to the vendor. The court held these payments good as against defendant, because defendant's deed was not record notice to the plaintiff, his interest having arisen before, and his possession was notice to the defendant of his rights as purchaser. The defendant should have given him notice of the sale under execution. In that event further payments would have to be

right of security by the vendor or his assignee or subsequent vendee will now be considered.

§ 91. The Vendor's Remedies Against a Defaulting Purchaser. The vendor's right to maintain specific performance against the purchaser, and the reasons therefore have already been discussed in detail.[27] Where, however, the purchaser is unable to pay for the property, so that the decree for specific performance cannot actually be carried out, it is usual to provide, in that event, that the property be sold and the proceeds be applied to the payment of the purchase price, and for a judgment against the purchaser for a deficiency, exactly as in the case of foreclosure by sale of a mortgage.[28] If the vendor

made to defendant, who acquired the vendor's rights to the purchase money by the conveyance of the vendor's interest in the land.

In Blackmer v. Phillips, 67 N. C. 340 (1872), the balance of the purchase price was secured by negotiable notes transferred to a holder in due course after a similar sale on execution of the vendor's interest. Payment of these notes by the purchaser was valid, irrespective of whether the purchaser had notice of the sale under execution or not, as their holders took free of the equity of the execution purchaser to receive the purchase price, and the original purchaser had no defense to the enforcement of the notes. The court declares (*dicta*) that the right to the purchase money could not pass by the sale of the land under execution. That the general rule is *contra,* in accord with the principle of Moyer v. Hinman, *supra,* see list of cases cited 1 Ames, Cas. Eq. 213 n, the right to the purchase money being reduced by payments made by the purchaser to the original vendor before receiving actual notice of the sale of the vendor's interest. A subsequent purchaser of the land for value without notice of the prior purchaser's rights, as where the prior purchaser had not taken possession, takes free of the equity of the prior purchaser, since he gets the legal title as a purchaser in good faith for value. Rogers v. Hussey, 36 Iowa 664 (1873); Jones v. Howard, 142 Mo. 117, 43 S. W. 635 (1897), [*dictum,* as plaintiff had actual notice]; Ames, *ibid.* 213 n.

In some states it is held that the debt for the purchase money must be reached by garnishment proceedings, as it does not pass on a conveyance of the vendor's legal title held by him as trustee for the purchaser. Baldwin v. Thompson, 15 Iowa 504 (1864), quoted, 2 Cook, Cas. Eq. 622 n.; Jones v. Howard, *supra,* and other cases cited Ames, *loc. cit.*

27 See § 68, *ante.*

28 In Strauss v. Bendheim, 32 Misc. 179, 66 N. Y. Supp. 247 (1900), the court said: "This action was begun to compel such performance . . . and judgment given for a specific performance, and, in case of inability of defendant to pay, for a sale by a referee, with judgment against defendant

chooses to enforce his security by foreclosure of the purchaser's interest he may do so without asking for specific performance of the contract, though it is clear that such foreclosure by sale is simply a modified form of specific performance, by which the vendor gets the purchase price, including the judgment for a deficiency, instead of damages at law.[29] Strict foreclosure, by

for any deficiency, and awarding to him any surplus on the sale after taking out of the proceeds the legal costs and expenses. This was manifestly the correct judgment, for plaintiffs were only entitled to the sum due on the contract, with indemnity for taxable costs and disbursements. Clark v. Hall, 7 Paige 382, 385.'' A third person bid in the property on this sale for an amount which realized a surplus of $1300. The court refused to divert this surplus to the plaintiffs, who claimed it in return for their trouble and expense in compelling this third person to take title, necessitating appeals to the Appellate Division and the Court of Appeals. See cases in notes following.

29 In January v. January, 7 T. B. Mont. 542 (Ky. 1828), the court declares that in land contract cases equity has full jurisdiction to grant full relief by ordering a sale and application of the proceeds and decreeing the payment of the balance remaining. Compare Cobb v. Duke, 36 Miss. 60 (1858), the court holding that equity has no jurisdiction to order payment of the balance due after application of the proceeds from the sale of the land, just as the law courts have no jurisdiction to order a sale of the land to enforce the equity of the vendor. The merger of law and equity in mortgage cases in nearly all jurisdictions (see § 24, *ante*), with the established practice in the United States of foreclosure by sale with a decree for any deficiency which may remain due thereafter, have eliminated this kind of technicality from the law. Certainly in any code state in which law and equity have been merged, as explained in Chapter IV, *ante*, there is no longer any room for holding that complete relief may not be given in the foreclosure action by a decree for the deficiency. The action to foreclose the purchaser's equity by enforcing the vendor's right arises out of the vendor-purchaser relation and is therefore dependent entirely upon the right to specific performance. The vendor may get the purchase money specifically (1) by specific performance of the contract (2) by a sale under foreclosure of the legal title which he holds as security for the purchase price, and a decree for the deficiency enforceable as a money judgment by execution. At law he could recover, in the usual case in which payment and conveyance are to be concurrent, only the difference between the contract price and the market price and would be left with the property on his hands. In either alternative in equity he gets specific relief as distinguished from damages at law.

That the regular method of enforcing the vendor's security for the purchase price is by foreclosure by sale with a decree or judgment for the deficiency enforceable by execution see White v. Sage, 149 Cal. 613,

which the equitable estate of the purchaser is extinguished by decree unless he completes the purchase by a date fixed by the court, is allowed in some states where the interest of the purchaser, as measured by payments of purchase money and for improvements, is not large.[30] It is clear that where the equity

87 Pac. 193 (1906), [it is an action for specific performance, not mortgage foreclosure]; Andrews v. Sullivan, 7 Ill. 327 (1845); Loveridge v. Shurtz, 111 Mich. 618, 70 N. W. 132 (1897), and other cases cited, 36 Cyc. 792. See also cases in notes following. As explained in several of the above cases, the decree for specific performance usually provides that if the purchaser is unable to pay for the property it shall be sold, and the proceeds applied to the payment of the balance due on the purchase price. Foreclosure is really a form of specific enforcement of the contract for the vendor's benefit in these cases.

30 Sparks v. Hess, 15 Cal. 186 (1860); Southern Pac. R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796 (1896); Andrews v. Sullivan, *supra* note 29; Vail v. Drexel, 9 Ill. App. 439 (1881); Abbott v. Moldestad, 74 Minn. 293, 77 N. W. 227 (1898); Fitzhugh v. Maxwell, 34 Mich. 138 (1876); Champion v. Brown, 6 Johns. Ch. 398 (N. Y. 1822); Clark v. Hall, *supra* note 28.

In Flanagan v. Great Cent. L. Co., 45 Ore. 335, 77 Pac. 485 (1904), the court, after reviewing cases in Illinois, Minnesota, Indiana, Nebraska and Oregon, holding that strict foreclosure should not be used except in special cases, and never where it would operate harshly and unjustly, as where a considerable part of the purchase price had been paid, or the property has greatly increased in value, said: "Thus we find that strict foreclosure is the exception, not the rule." The court permitted strict foreclosure under the special facts of that case. In Hawkins v. Rodgers, 91 Ore. 483, 179 Pac. 563 (1919), strict foreclosure was allowed only on condition that the vendor pay for improvements made by the purchaser.

Where no payment, or a comparatively small payment had been made, or where special reasons existed making strict foreclosure equitable, it has been allowed in several states. Morgan v. Dalrymple, 59 N. J. Eq. 22, 46 Atl. 664 (1899), and other cases cited, Pound, Progress of the Law (1920), 33 Harv. L. Rev. 834, n. 96.

Wisconsin has made strict foreclosure the rule in land contract cases. Button v. Schroyer, 5 Wis. 598 (1856); Nelson v. Jacobs, 99 Wis. 547, 75 N. W. 406 (1898). Dean Pound says of these cases, in the article referred to above: "This holding is based on the palpably fallacious argument that 'the title did not pass by the contract, but remained in the vendor;' as if the title to mortgaged land were not in the mortgagee." Of course the title is held by the vendor as security, just as the technical legal title is in the mortgagee as security. Foreclosure in both cases should be guided by the same principles.

Dean Pound adds: "Strict foreclosure should only be permitted where no substantial payment has been made, or where the present

of the purchaser is substantial, foreclosure by sale should be required in order that the purchaser's interest may be protected on the sale, just as a mortgagor's equity may be protected in corresponding cases of foreclosure of mortgages.[31]

If the purchaser has broken the contract by repudiating it and refusing to carry it out, not by mere delay in performance, or if his delay is so great that he has lost the right to specific performance, the vendor may at his option rescind the contract by returning to the purchaser whatever may be necessary to restore the *status quo ante*, instead of enforcing specific performance or foreclosing.[32] The vendee, in the event that the vendor repudiates the contract, or is unable to perform because of a defective title, may rescind on like terms, instead of enforcing specific performance, or partial specific performance with compensation, or recovering damages at law, as explained heretofore.[33] Indeed, rescission or the recovery of damages would seem to be the only remedies in cases where specific performance with compensation would be harsh and oppressive.[34]

§ 92. Purchaser's Lien for Payments and Vendor's Lien for Purchase Price. In England and in a majority of the states in this country the vendor has a lien for the balance of the purchase price still due after a conveyance to the purchaser for which a purchase money mortgage or other security has not been given.[35] In the same states, based on similar reasons, the

value of the land is less than the amount due vendor, or where, as in the present case (Hawkins v. Rodgers, *supra*), purchaser having made improvements under the contract, vendor elects to pay for them.''

31 See *supra* notes 29 and 30.

32 Lytle v. Scottish Am. Mtg. Co., 122 Ga. 458, 50 S. E. 402 (1905), [holding that the vendor must return purchase money paid by the purchaser, including such payments called ''rent'' so far as they exceeded the fair rental value, and also value of improvements, less rent and damages. He may, at his option, foreclose by sale, as explained above]; Perlee v. Jeffcott, 89 N. J. L. 34, 97 Atl. 789 (1916), [destruction of barn made performance impossible. Purchaser recovered payments made]. On rescission and restitution thereunder generally see 3 Williston, Contracts, Ch. XL, 2588, *et seq.*

33 See § 75, notes 60–68; § 76, notes 73, 75, 76, 79, 84, and text to which they refer.

34 § 76, notes thereunder, and text referred to in *supra* note 33.

35 See cases in notes following, and cases referred to therein establishing the doctrine of vendor's lien

purchaser is given a lien on the land, prior to the transfer of title, for purchase money paid by him, and enforceable in case he elects to rescind because the vendor cannot convey a marketable title. Though in some of the cases this lien has been declared to exist where the purchaser is in possession, or had made improvements, or where special equities existed, it is now settled generally in the states recognizing and enforcing these liens that it exists in any case where the purchaser has made payments prior to the transfer of title, irrespective of such possession, improvements or other equities.[36] The existence of an equitable estate in the purchaser measured in value by the amount of his payments on account of the purchase price, and to that extent the vendor holds the legal title in trust for him, is the basis of the holding that a corresponding lien exists in his favor if the vendor is unable to perform because of a defective title. It is urged in a leading New York case that enforcement of this lien is strictly in affirmance of the contract, not a rescission.[37] But recovery of the payments by the purchaser

after conveyance to purchaser. For a recent case involving the vendor's lien see Thatelbaum v. Neidorf, 100 N. J. Eq. 236 (1926).

36 Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937 (1908), citing Clark v. Jacobs, 56 How. Pr. 519 (N. Y. 1878); Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711 (1901); Bullitt v. Eastern Ky. Land Co., 99 Ky. 324, 327, 36 S. W. 16 (1896); Shirley v. Shirley, 7 Blackf. (Ind.) 452 (1845); Coleman v. Floyd, 131 Ind. 330, 335, 31 N. E. 75 (1892); Galbraith v. Reeves, 82 Tex. 357, 18 S. W. 696 (1891); Newman v. Maclin, 5 Hayes. 241 (Tenn. 1813); Wickman v. Robinson, 14 Wis. 493, 496 (1861). "We find no well-considered case in any state that denies a lien to the vendee, even if payment is the only ground therefor, except such as withhold a lien from the vendor also. Ahrend v. Adiorne, 118 Mass. 261; Philbrook v. Delano, 29 Me. 410." The court then reviews the development of the rule in England, starting with a statement of the doctrine in Burgess v. Wheate, 1 Blacks. 123, 150, recognized by Lord Eldon in Makreth v. Symmons, 15 Vesey 329, 344, 33 Eng. Rep. 778 (1808), and established definitely in Wythes v. Lee, 3 Drew. 396, 403, 61 Eng. Rep. 954 (1855). Later English cases enforcing the lien are Rose v. Watson, 10 H. L. Cas. 672 (1871); Whitbread & Co. v. Watt [1902], 1 Ch. 835. The court quotes 2 Story, Eq. Jur. (8th Am. Ed.), 1217 n.; 3 Pomeroy Eq. Jur. (3d Ed.), § 1263; 1 Perry, Trusts (5th Ed.), § 231; 2 Jones, Liens, § 1105, and several other authorities, all declaring the rule as laid down by the court.

37 Elterman v. Hyman, *supra* note 36, in answer to the argument that "the whole agreement is to be taken together and completely performed or wholly rescinded, and

necessarily amounts to rescission of the contract instead of its enforcement, either by way of specific performance with compensation in equity, or by the recovery of damages at law. The logical way to express the situation would seem to be that before the purchaser elects to rescind he is equitable owner of the land, provided he may enforce specific performance with compensation; when he elects to rescind because of the vendor's breach (assuming a proper case for rescission, the vendor having no right to specific performance), equity gives him a lien for the purchase money paid by him in reliance on the security of his equitable interest in the land, just as equity gives the vendor a lien for unpaid purchase money when he conveys title to the purchaser, because justice demands it. The continuance of the contract unrescinded is in no way necessary to this lien. The technical notion that a rescission eliminates the contract *ab initio* as though it had never existed, destroying the lien, is without any justification whatever. The lien arises as a substitute for the purchaser's equitable estate when that estate is ended by the rescission. The rescission, therefore, brings the lien into existence. This technicality resulted in a serious mistake on the part of the Court of Appeals when they decided at the same time that no lien existed for such payments when the purchaser rescinded because of the vendor's fraud,[38] resulting in the anomaly that the purchaser will have this lien against a vendor who has been merely mistaken as to his title, but not against a vendor guilty of a wilful fraud. The importance of getting down to the fundamental reasons in the law could not be better illustrated.

§ 93. Possession as Between Vendor and Purchaser. If the contract makes no provision that the purchaser is to have possession prior to the delivery of the deed, the vendor retains the exclusive right to the possession and enjoyment of the

that rescission by the vendee destroys the contract *in toto* and *ab initio.*" The court admits that none of the authorities relating to the vendee's lien "seem to regard the doctrine of rescission as at all applicable to the subject." Three of the judges concurred on opinion by Gray, J., in Davis v. Rosenzweig Realty Oper. Co., 192 N. Y. 128, 84 N. E. 943 (1908), decided at the same time.

38 Davis v. Rosenzweig Realty Oper. Co., *supra* note 37. See § 107, n. 35, *post.*

property, the right of possession passing with the title to the purchaser on delivery of the deed.[39] Though the vendor permits the vendee to take possession, unless a tenancy at will or until the closing of title is created, the purchaser holds under a license which may be ended at any time by the vendor and the possession recovered by him.[40] Where the contract expressly provides for possession by the purchaser, or contains provisions from which such right of possession is clearly implied, the purchaser has the right to possession prior to the transfer of title.[41] His right of possession, however, is lost if he is in default, refusing to perform the contract, or has delayed performance so long that his right to compel specific performance no longer exists.[42] If time is not of the essence, or where time is expressly of the essence, but his delay is not so serious that equity will not relieve him of his default, he may meet the action in ejectment by a counter action for specific performance under statutes providing for equitable defenses and counterclaims in law actions.[43] Though the vendor is in default because of a defective

39 Holmes v. Schofield, 4 Blackf. 171 (Ind. 1836), Durfee, Cas. Eq. 738; Miller v. Swift, 39 Ga. 91 (1869). See, also, cases in notes following under this section.

40 Spencer v. Tobey, 22 Barb. 260 (N. Y. 1856); Kratemayer v. Brink, 17 Ind. 509 (1861). In Harris v. Frink, 49 N. Y. 24 (1872), the court held that the purchaser entering under his contract was a tenant at will and as such was entitled to emblements. The parol contract under which he entered provided for his right of possession. The court said: "And there is much authority in favor of the position that one who is let into possession under a contract to purchase is strictly a tenant at will," citing Washburn, Real Prop. (3d Ed.), 511, 513, 515, and several cases, "He is not entitled to notice to quit if he makes default in his contract. Jackson v. Miller, 7 Cow. (N. Y.) 747. . . ."

41 Harris v. Frink, *supra* note 40; Corning v. Loomis, 111 Mich. 23, 69 N. W. 85 (1896); Martin v. Schofield, 41 Wis. 167 (1876); Sample v. Lyons, 59 App. Div. 456, 69 N. Y. Supp. 378 (1901).

In such cases, he may set up his contract for possession as a defense to ejectment, provided he is not in default under his contract to purchase. Schoolfield v. Rhodes, 82 Fed. 153 (1897); Kingsnorth v. Baker, 213 Mich. 294, 182 N. W. 108 (1921). See Jackson v. Miller, *supra* note 40 (tenant in default.)

42 Whittier v. Stege, 61 Cal. 238 (1882), Durfee, Cas. Eq. 740; Burnett v. Caldwell, 76 U. S. (9 Wall.), 290 (1869).

43 Hansbrough v. Peck, 72 U. S. (5 Wall.) 497 (1866); Taylor v. Longworth, 39 U. S. (14 Pet.) 172 (1840). See Ch. IV, *ante*, as to merger of law and equity and equitable defenses in law actions.

title, the purchaser cannot retain the possession indefinitely. Assuming that the defect in title is one which the vendor cannot remove, the purchaser may elect to rescind, recovering the amount which he has paid on the purchase price and the value of improvements made, less the fair rental value of the premises, or he may in a proper case enforce partial specific performance with compensation.[44] Failure to elect within a reasonable time will subject him to the vendor's action to foreclose his equity under the contract.[45]

The purchaser in possession under his contract may maintain trespass against third persons, and even against the vendor who enters without his permission.[46] He may convey, lease or mortgage all or any part of the property, or grant an easement therein,[47] and he has full rights of use and enjoyment such as

[44] See § 76, *ante* and § 91, n. 32–34, *ante*.

[45] McIndoe v. Morman, 26 Wis. 588 (1870), and cases cited therein.

[46] Smith v. Price, 42 Ill. 399 (1866), Durfee, Cas. Eq. 746; Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121 (1905).

Where neither party was in possession the purchaser was not allowed to maintain trover against a trespasser who cut and removed timber from the land, as the vendor had the action. Moyer v. Scott, 30 Mich. 345 (1874). See Garrett v. Beers, 97 Kan. 255, 155 Pac. 2 (1916). [Purchaser who had entered was owner for purposes of recovering damages for injury to the property]. In Foley v. Wyeth, 84 Mass. (2 Allen) 135 (1861), action of a tenant at will against a defendant who interfered with an easement appurtenant to the land was sustained.

In Witheral v. Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758 (1888), purchaser in possession recovered for damage to pasturage and to hay crop by flood caused by log jam.

[47] Baldwin v. Pool, 74 Ill. 97 (1874), Durfee, Cas. Eq. 748. In Miller v. Waddingham, 19 Cal. 377, 27 Pac. 750 (1891), the court refused to restrain removal of buildings erected by the purchaser in possession, there being no evidence of impairment of the vendor's security. See also Small v. Slocumb, 112 Ga. 279, 37 S. E. 481 (1900).

In Baldwin v. Pool, *supra*, the court said: "Mahala Thurston being the equitable owner of the property, her interest was such that it could be sold on execution. She could mortgage it for the payment of her debts. She could sell or create a privilege or easement upon any part of the premises which would be valid and binding, but liable to be defeated should there be a failure to pay the balance of the purchase money according to the terms and conditions of the contract of purchase. Baker v. Bishop Hill Colony, 45 Ill. 264; Lombard v. The Chicago Sinai Congregation, 64 Ill. 477."

the rights enjoyed by a mortgagor in possession, because of his equitable ownership, and the vendor can restrain him from acts of waste only where his security for the purchase price will be unduly impaired, exactly as a mortgagee is protected in equity against waste by the mortgagor.[48] The purchaser in possession, as owner in full enjoyment of the land and its profits, must pay the taxes which accrue after taking possession, though the contract requires a conveyance free from incumbrances.[49]

§ 94. Vendor in Possession; Right to Use and Profits; Responsibility for Damages to the Land. The vendor in possession under the usual contract, which calls for delivery of possession on the delivery of the deed, is entitled to the full enjoyment of the property and all rents and profits accruing before the transfer of title in accordance with the express terms of the contract.[50] In this respect he differs from a mortgagee in possession, who has no beneficial rights in such possession except as security and who must therefore apply all net income derived from his possession to the payment of the mortgage debt.[51] It cannot fairly be argued that he is not a trustee because of his beneficial right to the rents and profits during this interval. He holds the property in trust to convey according to the contract, and by the same contract the rents and profits are reserved to him prior to the conveyance. In all other respects he holds as

[48] See § 27, notes 41, 42, *ante*, as to waste by mortgagor. In Moses Bros. v. Johnson, 88 Ala. 517 (1889), the court held that the same rule applied to a purchaser in possession as to a mortgagor in possession, citing King v. Smith, 2 Hare 239 (cited § 27, n. 41, *ante*), for the rule applying to waste by a mortgagor. See also cases *supra* note 47, and other cases cited, 1 Ames, Cas. Eq. 222, n. 2.

[49] Miller v. Corey, 15 Iowa 166 (1863), and other cases cited in note 43 L. R. A. (N. S.) 51. Where possession is given pursuant to the contract on delivery of the deed, the vendor must, of course, pay the taxes in order to give an unincumbered title. Nungesser v. Hart, 122 Iowa 647, 98 N. W. 505 (1904).

[50] This is universally recognized in all cases involving the existence of the vendor-purchaser relation. See especially cases cited under § 95, *post*, involving adjustment of accounts between vendor and purchaser on enforcement of the contract.

[51] Townsend v. Thompson, 139 N. Y. 152, 34 N. E. 891 (1893), [construed and limited in Herrman v. Cabinet Land Co., 217 N. Y. 526, 112 N. E. 476 (1916)]; Moore v. De Graw, 5 N. J. Eq. 346 (1846); Shaeffer v. Chambers, 2 Halst. 548 (N. J. Eq. 1847); 2 Walsh, Cas. Prop., 1170–1173.

trustee, as is fully established by the cases heretofore discussed and cited. If he wilfully or negligently damages the property in a way which permanently reduces its value or permits it to fall to ruin or decay he has exceeded his beneficial right of enjoyment, and has violated the trust which equity implies, and he is liable to the purchaser accordingly.[52]

§ 95. Adjustment of Accounts Between Vendor and Purchaser on Specific Performance. Where the purchaser enforces specific performance against the defaulting vendor, the court ascertains and awards the damages to which the plaintiff is entitled because of the defendant's delay in order that the entire matter may be settled in a single action. The general rule is that the vendor will be charged with the rents and profits or the reasonable rental value during the period he is in default, that is from the time fixed by the contract for the conveyance until possession is given, less the interest on the purchase money which is charged against the purchaser.[53] But special situations of fact require modifications of this rule. Thus where the purchaser tendered the purchase price at the date fixed by the contract, and deposited that amount in a special fund or account maintained for the purpose of paying for the property at any time when the vendor should become ready to convey, receiving no return thereon, he will not be charged with interest

[52] Clark v. Ramuz, [1891] 2 Q. B. 456, 2 Cook, Cas. Eq. 554; Phillips v. Silvester, L. R. 8 Ch. App. 173 (1872), [holding the vendor liable for deterioration due to neglect]; Worrall v. Munn, *post* note 53; Bostwick v. Beach, 105 N. Y. 661, 12 N. E. 32 (1887); Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575 (1891). In Hellreigel v. Manning, 97 N. Y. 56 (1884), the court declares that the vendor owed the vendee no duty to keep the property in repair, but in that case the vendor-purchaser relation did not arise until the purchaser exercised his option to resell the property to the original vendor, shortly before the action was brought, and the failure to maintain the property preceded this. It would seem to be immaterial under the cases and on principle whether the waste was committed after or before the time fixed for performance.

[53] Worrall v. Munn, 38 N. Y. 137 (1868), 53 N. Y. 185 (1873); Atchison &c. R. Co. v. Chicago &c. R. Co., 162 Ill. 632, 44 N. E. 823 (1896); Simonds v. Essex Pass. Ry. Co., 57 N. J. Eq. 349, 41 Atl. 682 (1898); Delaware Co. v. Burson, 61 Pa. 369 (1869). See cases in notes immediately following, recognizing the general rule, also additional cases cited 1 Ames, Cas. Eq. 219 n.

on the purchase money.[54] Where there are no rents and profits, and the land has no definite rental value, as where the land sold is valuable principally for the taking of mineral deposits, clay, timber, or other product which are part of the physical corpus of the land, and the working of the land would involve the depletion of the product which makes it valuable, and no rental value for such use over and above the reduction in value of the land by such depletion can be arrived at, the purchaser will not be charged with interest on the price since the vendor cannot be charged with rents and profits or rental value.[55] It seems to be now the rule that the purchaser may elect to forego rents and profits and thereby free himself from the charge of interest on the purchase money whenever that is to his advantage, viz., whenever the interest would exceed the rents and profits, because it would be inequitable to permit the vendor, who causes the delay in performance by his breach, to gain a profit by so doing at the expense of the purchaser.[56]

§ 96. **Risk of Loss Between Vendor and Purchaser.** As the purchaser is equitably and beneficially the owner of the property pending performance of the contract before and after

[54] Roberts v. Massey, 13 Ves. 561, 33 Eng. Rep. 404 (1807); Bostwick v. Beach, 103 N. Y. 414, 9 N. E. 41 (1886), 105 N. Y. 661, 12 N. E. 32 (1887); Sanders v. Boyer, 152 Mass. 141, 25 N. E. 86 (1890); Beckwith v. Clark, 188 Fed. 171 (1911), and cases therein cited. In Bostwick v. Beach, *supra*, on the second appeal (105 N. Y. 661), it was established by affidavit that the purchaser had withdrawn and used all or most of the money so deposited. The court held that interest on such amounts from the time of their withdrawal would have to be charged against him, but in that event he might be allowed for waste committed by the vendor *pendente lite* as claimed by the purchaser.

[55] Morrell v. Munn, *supra* note 54; King v. Ruckman, 24 N. J. Eq. 298 (1873); DeVisme v. DeVisme, 1 Macn. & G. 336, 41 Eng. Rep. 1295 (1849).

[56] Cases *supra* note 55. See additional cases cited 1 Ames, Cas. Eq. 219 n.

Admitting the purchaser to possession before the date fixed for closing, or giving him such possession because the contract so provides, is no reason for implying a promise to pay interest on the purchase money before payment thereof becomes due. Nothing being expressly agreed for such payment, interest accrues only after the principal becomes due under the contract. Minard v. Beans, 64 Pa. 411 (1870); Lofland v. Maul, 1 Del. Ch. 359 (1830).

the date fixed for performance, subject only to the vendor's right to possession and rents and profits prior to such date, and to his security for the purchase price, it is settled by the great weight of authority that the risk of loss prior to the transfer of title from fire or other casualty falls on the purchaser, so that he must carry out the contract, accepting a conveyance of the property in its damaged state without deduction from the purchase price on that account.[57] The equitable doctrine which gives rise to the vendor-purchaser relation has been challenged principally in connection with these cases, and their consideration should be preceded with a review of the reasons on which this equitable doctrine is based.

At law unmodified by the equity view through code merger or otherwise, destruction in whole or substantial part of the subject matter of the contract to sell before the time fixed for performance relieves both parties from obligation under the contract, the loss falling on the vendor. If the loss takes place after the time fixed for performance, one or the other party is in default, and his liability for damages will remain unaffected by the destruction of the subject matter. The loss falls on the vendor in that case also, because if he can hold the purchaser for damages his recovery is not enhanced by the loss arising out of the destruction of the property.[58] Professor Langdell says that the same rule should apply in equity where the loss occurs before the time fixed for performance because the vendor will be unable to perform his contract, and the purchaser's right is solely a personal right in contract; but if the loss occurs after the time fixed for performance, as the right to specific performance accrues at that time, subsequent enforcement will be as of that date, and therefore the loss falls on the vendee because equity treats him as the owner from the date fixed by the contract for the conveyance of the land.[59]

He gives as the reason for the prevailing rule that the risk of loss falls on the purchaser before as well as after the date set for performance, the prevalence of the notion that a contract to convey land is in equity an actual conveyance, this in turn

57 See cases cited in notes under § 97, *post.*

58 Langdell, A Brief Survey of Equity Jurisdiction, 58.

59 *Ibid.* 59, *et seq.*

being based upon the doctrine of equitable conversion, by which the intent of the owner that real property shall pass on his death as personalty, or *vice versa,* is given effect in equity by treating the property as converted accordingly for the purpose of such succession, though no conversion has occurred in fact, and he points out that this doctrine can apply only to the heirs and personal representatives of the parties, having no possible application to the purchaser.[60] It seems clear, however, that the courts do not base the rule on the doctrine of equitable conversion. Professor Langdell was entirely right in asserting that equitable conversion could not affect the right or interest of the purchaser. The rule is based on the principle that the contract gives to the purchaser in fact and substance the real ownership of the land, the vendor retaining in his own right possession, rents and profits for the brief interval before performance, and the legal title as security for the purchase money. The land passes to the heirs or devisees of the purchaser on his death prior to the time fixed for performance, as explained heretofore,[61] because he is its real owner, not because of any intent of vendee or vendor to change its natural devolution on his death.

The question must turn on whether the purchaser does become in fact and substance the dominant owner of the property, subject to the vendor's rights as explained heretofore,[62] so that the risk of loss should fall on him because the dominant ownership is in him. The vendor must hold the property for him, and will be chargeable like any trustee for acts of waste committed during the period prior to the time fixed for closing which we are considering.[63] He is entitled to the property as against any person succeeding to the vendor's title except a purchaser for value without notice.[64] His interest is such that it passes to his heir or devisee as realty on his death.[65] On the other hand he is not entitled to possession or to the rents and profits during this interval unless the contract so provides.[66] If he is owner subject to the holding of the legal title by the vendor as security, he has not the usual right of a mort-

60 *Ibid.* 60, *et seq.*
61 See § 86, *ante.*
62 §§ 86–95, *ante.*
63 §§ 87, 90, 91, 94, *ante.*
64 §§ 86, 87, *ante.*
65 § 86, *ante.*
66 §§ 93, 94.

gagor to possession, rents and profits, and where the contract is purely executory, no considerable part of the purchase money having been paid, equity will not relieve him from his default where time is expressly of the essence, or is made of the essence,[67] though a mortgagor could redeem in spite of express provisions attempting to limit in a similar way the right to redeem.[68] His actual right to maintain specific performance does not arise until the time for performance as fixed by the contract has passed without performance by the vendor. These are the more important reasons urged for holding that, though he has a substantial interest in the property which equity protects and enforces, he has no such dominant ownership as justifies putting on him the risk of loss from destruction or damage to the property; that the dominant ownership is retained by the vendor at least until delivery of possession prior to the time fixed for closing the contract.[69]

Too much weight has been given by critics of the prevailing rule to the vendor's right to the possession and rents and profits. The usual period involved is a matter of only thirty or sixty days. If an owner by deed of gift transfers to another a tenancy for thirty or sixty days, the tenant would have a corresponding right of possession and rents and profits. Yet no one would argue that such a tenancy would seriously modify the substantial ownership of the property. If equity regards the purchaser as entitled to be protected in his specific right to the land during the interval in every other respect, surely equity is justified in regarding him as in substance and fact the dominant owner, though his actual enjoyment will not take effect in possession until the short interval fixed by the contract has elapsed.

It is not surprising that equity has not applied to the vendor-purchaser relation every incident attaching to the mortgagor-mortgagee relation. There are differences between the conveyance of property as security for repayment of a loan and the holding of the legal title by a vendor under a contract of purchase. No mortgage formal or informal is intended. Equity

67 See § 74, *ante;* 2 Williston, Contracts, § 937.

68 Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163 (1900); citing Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 100.

69 2 Williston, Contracts, 1774, *et seq.*

simply holds that as the purchaser becomes the real or substantial owner by the contract, the legal title held by the vendor may be retained until the purchaser performs as security for such performance. We may easily lose our sense of proportion here, and get a false perspective by regarding the relation as really that of mortgage when it only similar to a mortgage. It is clear that in other respects generally the rules applying to the mortgage relation apply here.[70] Nevertheless all we have is a contract for the sale of land subject to specific performance.

In working out the purchaser's right to be relieved from a forfeiture arising from delay in paying the purchase price where time is of the essence, the courts have approached the problem from the standpoint of the law of contracts. The slow development by which the courts have generally come to recognize that a true case of forfeiture exists in these cases, as in cases of mortgages and forfeitures for breaches of condition involving mere delay in money payments, has been discussed in an earlier chapter.[71] Surely the fact that equity refuses to interfere where the forfeiture involves no serious loss to the purchaser, when he has paid only a small deposit covering approximately the damages from his breach of contract, is no reason for urging that he is not in substance owner of the land subject to the holding of the legal title as security by the vendor. Even in such cases the vendor, to protect himself against the purchaser's equity, finds it expedient to bring an action to wipe it out by foreclosure, and these are the usual cases in which strict foreclosure is allowed.[72]

The fact that the actual transfer of the legal title is to take place a short time in the future does not touch the question if the purchaser is actually entitled to have the property held and protected for him during the interval, so that it is his to convey or devise, his to pass on his death by inheritance subject to his widow's dower, his for the purpose of paying his debts, and for all other purposes in equity except the vendor's short period of possession and enjoyment. Beneficial possession and enjoyment remain in the vendor for the short time involved because the parties so intend. When it appears further that the

70 § 91, *ante.*

71 See § 74, *ante.*

72 See § 91, *ante.*

vendor holds the title subject in equity to all these rights in the purchaser, entitled beneficially only to the purchase price secured by the legal title (apart from the right of temporary possession and enjoyment above referred to), which passes as a chose in action to his assignee, or to his personal representative on his death, it is not difficult to understand why the courts have decided that the risk of loss during this interval falls on the purchaser as dominant owner.

The best argument in favor of the minority view that the risk of loss remains with the vendor prior to the time fixed for performance is that as a practical matter it is more expedient, and more in accord with practical common sense and business practice. To meet the situation created by the general rule there is no doubt that contracts for the sale of land often provide expressly that the risk of loss from fire or other casualty shall remain with the vendor, eliminating the need of arranging at the time the contract is made for a modification of fire insurance so that the interest of the purchaser may be expressly covered prior to the closing. That the parties to such contracts do not usually adjust the insurance as of the date of the contract by having the policies modified at that time, and adjusting the cost of premiums as of that date, leaving those details for adjustment as of the date of closing, tends strongly to establish how business men regard the matter. Furthermore the vendor is normally protected by insurance, while the purchaser is not during this interval.[73] The position taken by an ever increasing number of the courts, that the insurance held by the vendor is held by him as trustee for the purchaser, just as he holds the legal title as trustee, meets the situation fairly, and is the only position that can well be taken in states holding that the purchaser assumes the risk of loss without surrendering reason and common sense to empty technicality.[74]

[73] The practical advantages of the minority rule are discussed by Professor Williston (2 Contracts, § 942) along somewhat different lines. It saves litigation, as the contract ends and the loss stays with the legal title in the vendor. The vendor in possession will be more careful if the risk is his then he would be if the risk is the purchaser's. He then discusses the insurance situation referred to above.

[74] This matter is discussed, § 97, *post*.

It is clear from what has gone before that the prevailing law in this matter is based on substantial reasons. Irrespective of popular notions and business practice, under the prevailing law the purchaser is in substance owner of the land and the vendor is owner of a chose in action for the price with the land as security. Destruction by fire destroys the property of the purchaser and the security of the vendor. The purchaser has surely the right to insist on getting his property under the contract, however damaged it may be. Why should the vendor's chose in action for the price be reduced because of the damage to the property? The doctrine of partial performance with compensation does not apply, based as it is on the combination of specific performance with damages at law for the vendor's failure to perform in full, because the vendor cannot possibly be held liable at law for damages. The apparent hardship to the purchaser may be easily met by adjusting the insurance so as to cover the parties as their interests may appear, exactly as between mortgagor and mortgagee. Even this is unnecessary if the courts hold, as many do and as all should where the majority rule prevails, that the vendor's insurance is held by him under the same trust by which he holds the land, imposed by equity as a remedial fiction like all other implied trusts.

§ 97. State of the Law as to Risk of Loss as Between Vendor and Vendee. The law has been settled in England since the decision by Lord Eldon of Paine v. Meller [75] that the purchaser must take the land without deduction from the purchase price though buildings therein were destroyed by fire or other accident between the date of the contract and the time for performance. The same rule has been generally accepted in the United States, for reasons discussed in the preceding section.[76]

[75] Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801).

[76] Hough v. City Fire Ins. Co., 29 Conn. 10 (1860); Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225 (1887), [vendor must bear loss if he expressly agrees to deliver in the condition at time of contract]; Brewer v. Herbert, 30 Md. 301 (1868), [the court points out that where the value of the estate purchased is increased during the interval between contract and performance, as by the termination of outstanding life interests, by sudden increase in value of the land because needed for a public purpose or by discovery of a mine on the

In a few states, after some uncertainty this doctrine has been rejected, the courts holding that irrespective of the incidents of the vendor-purchaser relation, and the purchaser's rights thereunder, his rights are executory under the contract until the time of performance has arrived.[77] That the loss falls on the purchaser when the loss occurs after the time for performance of the contract seems to be accepted everywhere, assuming that his right to specific performance still exists. Yet the only practical difference is that the short period of the vendor's right to possession and enjoyment has come to an end. There is no change otherwise, the purchaser's right to the specific property and the vendor's right to the land as security for the purchase price continuing unaffected.

land, the purchase gets the benefit]; Walker v. Owen, 79 Mo. 563 (1883); Marion v. Wolcott, 68 N. J. Eq. 20, 59 Atl. 242 (1904); Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910); Reed v. Luckens, 44 Pa. 200 (1862); Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. 548, 12 Atl. 676 (1888); Baker v. Rushford, 91 Vt. 495, 101 Atl. 769 (1917); Maudru v. Humpries, 83 W. Va. 307, 98 S. E. 259 (1919). See list of cases 1 Ames, Cas. Eq. 228, n. 2, and 2 Williston, Contracts, 1766, n. 39. See also cases cited in notes following under this section.

77 Wilson v. Clark, 60 N. H. 352 (1880); Libman v. Levenson, 236 Mass. 221, 128 N. E. 13 (1920), [Settling the question in Massachusetts, earlier Massachusetts cases not directly in point as explained by Dean Pound, Progress of the Law (1920) 33 Harv. L. Rev. 813, 827 n.]; Ashford v. Reese, 132 Wash. 649, 233 Pac. 29 (1925), [for the reason that no equitable interest arises in purchaser, three judges dissenting; dissenting opinion points out logical results of this theory in other cases]. In Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796 (1900), the court expressly approves of Paine v. Meller but holds that the rule of that case does not apply because the vendor's title was so defective that he could not convey at the time of the fire. In Good v. Jarrard, 93 S. C. 229, 76 S. E. 698 (1912), the vendor was in a similar situation at the time of the loss. Referring to other cases cited in articles or texts as *contra* to the general rule, they are disposed of by Dean Pound [33 Harv. L. Rev. 827 n., *supra*], as follows: "In two more, Wells v. Calnan, 107 Mass. 514, . . . and Powell v. Dayton, 12 Ore. 488, 8 Pac. 544 (1885), Id. 14 Ore. 356, 12 Pac. 665 (1887), Id. 16 Ore. 33, 16 Pac. 863 (1888), the action was brought at law by the vendor. . . . For the rest, Cutcliff v. McAnally, 88 Ala. 507, 512, 7 So. 331 (1889), is not even a strong *dictum;* Davidson v. Insurance Co., 71 Iowa 532, 534, 32 N. W. 514 (1887), was a question of construction of an insurance policy." See cases in note 78, *post*, on effect of possession by purchaser.

There is some authority for the proposition that if the purchaser is permitted to take possession during this interval prior to the time for performance the loss will fall on him, not otherwise.[78] The same reasoning is back of the idea that possession by the purchaser gives him an interest which equity will protect against forfeiture for delay where time is of the essence, discussed in an earlier chapter.[79] Apart from cases involving the Statute of Frauds, it is difficult to see how possession can be material, and under the many cases recognizing the prevailing rule, as well as under the cases holding *contra* to it, whether possession had been given to the purchaser or not seems to have made no difference.[80] Such possession is certainly not necessary

[78] Good v. Jarrard, *supra*, note 77, argues for the rule that the risk should attend possession because of the duty of the possessor to care for the property. As no right to specific performance existed when the loss occurred [see quotation from Dean Pound's article, *supra* note 77, this was *dicta*. Casual statements, that the loss falls on the purchaser who has taken possession as in Mackey v. Bowles, 98 Ga. 730, 734, 25 S. E. 834 (1896), do not mean that he does not assume the risk unless he has taken possession. In Conlon v. Osborn, 161 Cal. 659, 120 Pac. 755 (1911), the court sustained a recovery of the purchase money by the purchaser after a loss which occurred before performance while the vendor was in possession, citing several California cases. The opinion intimates that if the purchaser had taken possession the risk of loss would have been his.

In Amundson v. Severson, *post* note 83, the court expressly declared that the purchaser's possession was immaterial.

[79] See § 74, notes 46, 47, and text to which they refer.

[80] Prof. Ames says (1 Cas. Eq. 236 n.) that the "courts which have adopted the doctrine of Paine v. Meller, appear to have attached no importance to the question of possession . . . of the five state courts which have departed from the doctrine of Paine v. Meller, four, Maine, Massachusetts, New Hampshire and Oregon, have thrown the loss on the vendor, although the vendee was in possession at the time of the fire."

Dean Pound says [Progress of the Law (1920), 33 Harv. L. Rev. at 826, n. 68], referring to possession at the time of loss as a criterion: "There is practically no authority for this view. A *dictum* in Good v. Jarrard, 93 S. C. 229, . . . [contract not enforceable in equity] and an overruled decision of an inferior court in New York, Wicks v. Bowman, 5 Daly 225 (1874), are most in point." He rejects the analogy of sales of chattels because contracts to sell chattels give rise to no real right or equity in the purchaser. He added: "Possession is not material with respect to the passing or existence of either legal or equitable title to land. Why then should it be material as to the incidents of

to the vendor-purchaser relation on which the doctrine of risk of loss depends. Transfer of possession was very important prior to the Statute of Uses in all conveyances at law because livery of seisin of its equivalent was necessary. There was never any such limitation upon the creation of equitable estates, and the modern conveyance by deed without transfer of possession, going back to deeds of bargain and sale under the Statute of Uses, makes the old importance of possession in the transfer of interests or estates seem archaic today. Transfer of possession to a purchaser before delivery of the deed has been held to be such a change in title and interest as to vitiate a policy of insurance under the alienation clause in New York and elsewhere while the contract of sale without such transfer of possession does not.[81] Something may be said for the doctrine because of the good policy involved in having the risk accompany the possession as inducing greater care against loss, but surely no such general principle has ever been established as law.

It is clear that the risk of loss remains with the vendor when the contract so expressly provides, or where the contract provides that the property shall be conveyed in as good condition as when the contract was made.[82] The parties may, of course, bind themselves as to risk of loss in any way they please, and an express provision that the property shall be conveyed in as good

equitable title.'' In support of possession as a criterion, see Williston, The Risk of Loss After an Executory Contract of Sale in the Common Law (1895), 9 Harv. L. Rev. 109. *Contra*, Keener, Burden of Loss as an Incident of the Right to Specific Performance (1901), 1 Col. L. Rev. 1. See also, Stone, Equitable Conversion by Contract (1913), 13 Col. L. Rev. 369, 386, *et seq.*

81 Tiemann v. Citizens Ins. Co., 76 App. Div. 5, 78 N. Y. Supp. 620 (1902); Brighton Beach Racing Ass'n v. Home Ins. Co., 113 App. Div. 728, 93 N. Y. Supp. 654 (1906), and many other cases cited Richards, Insurance (3rd Ed.) 349, notes 2 and 3; *ibid.*, § 259, holding that purchaser in possession is ''unconditional and sole owner'' under standard fire policy. These are matters of interpretation of the policy of insurance, with particular reference to the moral risk involved, and turn on considerations not closely related to the question here discussed. As to relation of insurance law to this question see § 98, *post.*

82 Brownell v. Board of Education, &c., 239 N. Y. 369, 146 N. E. 630 (1925); Marks v. Tichenor, 85 Ky. 536, 4 S. W. 225 (1887); Green v. Kelly, 20 N. J. L. 544 (1845).

condition as when the contract was made is obviously an assumption of risk of loss by the vendor.

By weight of authority the risk of loss falls on the vendor if at the time of the loss his title is defective so that the purchaser could not be compelled to take the property though he clears up the title in time so that he could maintain specific performance if the fire or other loss had not occurred.[83] In such cases the purchaser may enforce specific performance with compensation, subject to the discretionary withholding of equitable relief in hard cases where damages would be the better and fairer remedy.[84] This means that the purchaser is in equity owner of the property with a right to damages given in the same suit by deduction from the purchase price, and arising from the vendor's failure to fully perform. That is why, by weight of authority and reason, his interest passes to his heirs on his death.[85] There seems to be no doubt that, on the vendor's death his interest under the contract as against a defaulting purchaser passes to his personal representative as personalty, and he may foreclose the contract and sell the property as against the defaulting purchaser for the benefit of the next of kin or legatees.[86] There is no doubt that where the vendor has no title, or where his interest is such that specific performance cannot be enforced against him, no equitable estate arises in the purchaser, since he is not entitled to anything but damages for breach of contract. But where specific performance with compensation can be had at the purchaser's election, why should his right to rescind pre-

83 Paine v. Meller, *supra* note 75; Phinizy v. Guernsey, and Good v. Jarrard, *supra* note 77; Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834 (1896); Amundson v. Severson, 41 S. D. 377, 170 N. W. 633 (1919), [purchaser had entered and continued in possession until nearly all the land was washed away by the Missouri river, plaintiff had only a 2/9ths interest; tendered good title 6 years after contract and 4 years after the loss. No rescission referred to]. See Pound, Progress of the Law (1920), 33 Harv. L. Rev. at 826, 827, and notes, in which this rule is recognized and applied, though not explained; also 2 Williston, Contracts, 1771, 1772, to same effect.

84 Phinizey v. Guernsey, *supra* note 77; Lombard v. Chicago Sinai Congregation, 64 Ill. 477 (1872). [Vendor failed to exercise option to clear title or to cancel contract because of defect in title until after fire.] See § 76, *ante*, as to specific performance with compensation.

85 See § 86, notes 9, 10, 11, and text to which they refer.

86 See § 86, note 6, latter part.

vent the trust in his favor from arising before he elects, as in the corresponding case of the vendor who has a similar option to enforce the contract or to rescind as against the defaulting purchaser? Logically and as a matter of prevailing law the vendor-purchaser relation exists in both cases, subject to termination if in either case the party elects to rescind instead of to enforce the contract, and therefore the heirs of the purchaser inherit his interest and the next of kin take the benefit of the vendor's interest in these cases.[87] Yet for the purpose of determining the risk of loss it is said that the vendor-purchaser relation does not exist at the time of the loss if the vendor is not then able to perform because of a defective title, or the purchaser is in default, because of the breach of a condition precedent.[88] Paine v. Meller stands definitely for this position, at least by way of *dictum*, because Lord Eldon emphasized as the reason for putting the loss on the purchaser that he had accepted the disputed title before the fire, making him the actual owner to all intents and purposes except the formal transfer of title. Most of the cases since have followed Lord Eldon's lead whenever this point was involved. Yet if the vendor-purchaser relation exists for all other purposes, why shouldn't the loss fall on the purchaser when the fire happens before he elects between rescission and enforcement? After election by him there can be no doubt, as the contract is ended if he rescinds, and his equitable interest is absolute if he elects to enforce the contract with compensation, and the risk would surely be his. There can be no doubt that in the corresponding case of the purchaser in default, the purchaser cannot set up his own default as a means of avoiding liability for a loss that may have taken place before election to enforce the contract by the vendor. A possible answer to this question is the fact that the vendor cannot enforce the contract because of his defective title, and therefore his right to the purchase money and to hold the land as security for its payment cannot exist until the purchaser elects to accept the title and to enforce the contract with or without compensation. But this is only another way of saying that the purchaser holds his equitable interest under the contract subject to the right to cancel it by rescission, and the vendor can no more complain of

[87] See references in notes 85 and 86, *supra*.

[88] See note 83, *supra*.

the uncertainty prior to such election than the purchaser can in the corresponding case where he is in default. The answer generally given is that the vendor-purchaser relation does not exist in these cases. But by weight of authority and reason, as we have seen, it does exist, subject to defeat by rescission, for other purposes generally, and therefore that reason fails. Where the defect of title is such that substantial performance by the vendor is doubtful the purchaser may rescind on discovering the defect,[89] though the fire or other loss has taken place, eliminating all question of the loss falling on him. The natural refusal of the purchaser to take the property after the loss in these cases is an election to rescind, and no doubt most of the cases may be explained on this theory. If the purchaser takes no action before the time fixed for performance, and the vendor is then able to give a clear title, the purchaser could not rescind because of defect of title, and a refusal to compel him to carry out his contract would be based solely on the change in the property by fire or other casualty. If the property was his, subject to his right to rescind during this interval, it is difficult to understand why the loss should not also be his if he fails to rescind before the vendor clears up his title. Certainly a defect of title such as a judgment or mortgage lien which may be readily paid off from the purchase money, since it gives him no right to rescind,[90] should in no way affect the rule that the risk of loss falls on him as the substantial owner of the property. There seems to be no case which has as yet worked out these problems in a rational way.

Where the land is taken for public purposes by eminent domain during the interval between the making and performance of the contract, the purchaser as equitable owner is entitled to the award, subject to the vendor's security for the purchase price, in accord with the general doctrine of the vendor-purchaser relation.[91]

89 See § 75, notes 60, 68, and text to which they refer.

90 Note 89, *supra*.

91 Stevenson v. Loehr, 57 Ill. 509 (1871); Gammon v. Blaisdell, 45 Kan. 221, 25 Pac. 580 (1891); Clarke v. Long Island Realty Co., 126 App. Div. 282, 110 N. Y. Supp. 697 (1908). In the latter case Judge Gaynor's dissenting opinion is based on the argument that the purchaser's equity of specific performance is optional with him; he may insist on damages for the vendor's failure to perform instead. The trouble with this argument is

§ 98. Insurance and Risk of Loss Between Vendor and Purchaser. In the usual case the vendor carries fire insurance on his buildings at the time the contract is made. It is established law generally that the contract to sell is not a breach of the condition in the standard policy that if any change other than by death take place in the interest, title or possession (except change of possession without increase of hazard), the policy shall be void, though if the purchaser be admitted into possession, there is a change of interest which vitiates the policy.[92] The vendor may, therefore, enforce the policy in case of fire for his own benefit.[93] It has been held in England that the money so recovered is not held by him as trustee for the purchaser, since he receives it under a personal contract of insurance, the benefit of which does not pass to the purchaser under his contract of purchase.[94] There is no doubt that the purchaser has no action against the insurance company, because the contract of insurance is strictly personal.[95] James, L. J., in Rayner v. Preston, *supra,* said: "This being the relation between the parties (trustee and *cestui que trust*) I hold it to be a universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or from what-

that it ignores the vendor's right to specific performance and to security for the purchase money. The interest of each is taken and paid for exactly as where mortgaged property is acquired by eminent domain.

In Schaefer v. E. F. Gregory Co., 112 Wash. 108, 192 Pac. 968 (1920), the court held that the purchaser might recover his payments rather than accept the award in condemnation proceedings because under the law in Washington a purchaser has no equitable estate. It seems clear that the fact that the contract had the usual instalment contract provision for forfeiture in case of failure to pay any instalment when due, though referred to in the opinion, as in the opinion in Ashford v. Reese, *supra* note 77, had no effect on the decision in either case.

92 See note 81, *supra.*

93 See cases in notes following.

94 Rayner v. Preston, 18 Ch. D. 1 (1881).

95 Brewer v. Herbert, *supra* note 76, the court holding that accidentally permitting the insurance to expire after the contract and before performance did not affect the vendor's right to specific performance. He was under no duty to insure, and if the policy had been maintained it could not be enforced against the company by the purchaser, though the vendor in that case would be bound in equity to account for the insurance money so received, citing Reed v. Lukens, 44 Pa. 200 (1862).

ever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner.'' The American cases which have followed this dissenting opinion are so many and so well considered, and the result is so clearly demanded in accordance with elementary principles of justice and sound reason, that it may fairly be taken as the prevailing law here that the insurance money collected by the vendor is held by him impressed with a trust for the purchaser.[96] Raynor v. Preston was followed by the holding

[96] Millville Aerie No. 1836, Fraternal Order of Eagles v. Weatherby, 82 N. J. Eq. 455, 88 Atl. 847 (1913), the court saying: ''As purchaser under a valid contract of purchase vendee became the equitable owner of the property . . . the vendor retaining the legal title simply as trustee and as security for the unpaid purchase money. By reason of this equitable relation of the parties to a contract of sale of land, it has been determined by the great weight of American authority that money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will, in equity, inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed.''

Commenting on this statement quoted in Brownell v. Board of Education, *supra* note 82, the N. Y. Court of Appeals said: ''These reasons may savor of layman's ideas of equity, but they are not law. The majority of the court in Raynor v. Preston were sound in principle. Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interest of the insured. . . . In common parlance the buildings are insured; but every one who stops to consider the nature of the insurance contract understands that they are not. Both in the forum and the market place it is known that the insurance runs to the individual insured, and not with the land. The vendor has a beneficial interest to protect, namely his own. The vendee has an insurable interest and may protect himself. The trustee as such has no insurance interest, and can only act for the *cestui que trust*. Plaintiff may not have the insurance money collected by the defendant. It is not a part of the *res* bargained for, and no trust relation exists in regard to it.'' This was *dicta*, as the loss was held to fall on the defendant vendor since the contract expressly provided that the vendor should deliver the premises ''in as good condition as they now are.'' See note 82, *supra*, and text. Therefore the vendor was obviously entitled to keep the insurance money.

Dean Pound says (1920), 33 Harv. L. Rev. at 829: ''It is submitted that the majority of the court in Raynor v. Preston was right.''

On the other hand see note by Professor Vance (1924), 34 Yale L. Jour. 87, and the American cases

that the vendor was required to refund the insurance money to the insurance company to the extent of the purchase money received, based on their right of subrogation to his rights under the contract against the purchaser.[97] The net result in England was, therefore, that the insurance company, after being fully paid for the insurance, and supposed to be rendering a service of a *quasi* public nature in insuring against loss by fire, in effect avoids all liability at the expense of both vendor and vendee, indicating to what absurd lengths technical reasoning may lead otherwise normal judges. This situation has been corrected by a

cited therein, sustaining the rule laid down in Millville Aerie &c. v. Weatherby, *supra*, as the prevailing American rule. Of course it is true that the insurance contract is personal, not *in rem*, and that the purchaser has no rights under it against the insurance company, *supra* note 95. The position taken by the cases which establish the prevailing rule *contra* to Rayner v. Preston is with a full appreciation of that elementary principle. They hold that if there is no such change in the title and interest of the insured under the policy as to avoid it, and the general rule is that there is not, so that the vendor may recover the full amount of the loss as owner in fee [the courts construing the policy as referring to the legal title only so long as possession is not given to the purchaser] reason and justice demand that a trust be impressed on the money so recovered by him for the benefit of the purchaser as beneficiary of the trust under which the vendor holds the property. There is, of course, no express trust, no contract of insurance taken out by a trustee as such, no running of the contract of insurance with the land [the express provisions of standard policies negative anything of the sort]. The vendor recovers the full loss, all of which represents the loss in value of the purchaser's property due to the fire, subject to the vendor's security for the purchase money. He recovers solely through the legal title which he holds as trustee for the purchaser. Equity simply impresses a trust on this money for the benefit of the purchaser because it is recovered by his trustee and takes the place in the hands of the trustee of the destroyed building which the vendor held as trustee for the purchaser. A clearer case for implying a trust as a remedial fiction [all implied or resulting trusts are of this description] can hardly be imagined.

The rule of Raynor v. Preston was changed in England by statute, 12 and 13 Geo. V, c. 16, § 105 (1922), providing that the purchaser may recover the insurance money from the vendor in the absence of a provision in the contract to the contrary. The text of the statute appears in Prof. Vance's note cited above.

97 Castellain v. Preston, 11 Q. B. Div. 380, 8 Q. B. Div. 613 (1882).

statute enacted in 1922, which establishes in England the prevailing American rule.[98]

[98] See *supra* note 96.

Where an option is not exercised until after the loss by fire or otherwise, it is settled everywhere except possibly in Connecticut that no equitable estate arises in the purchaser until the exercise of the option, and therefore the loss falls on the vendor. Strong v. Moore, 105 Ore. 12, 207 Pac. 179 (1922). Compare with Oregon cases cited, note 77, *ante*, and in 2 Williston, Contracts, 1766 n. 40.

CHAPTER XVIII

EQUITABLE EASEMENTS AND RESTRICTIONS

§ 99. **Restrictive Covenants Running with the Land.** One of the most common ways of creating easements is by restrictive covenant in a deed conveying land by which a restriction upon the use and enjoyment of the land is expressly created for the benefit of other land retained by the grantor. That such restrictions are easements expressly created by deed is entirely clear where a servient estate is burdened in this way for the benefit of a dominant estate, to run with the land as a burden on one estate and a benefit to the other perpetually, for life or for a term of years, as may be provided by the deed or inferred from its terms. Such so-called "covenants" run with the land because the easements so created are rights *in rem* binding the servient estate for the benefit of the dominent no matter how often either property may be transferred by conveyance, devise or inheritance.[1] They are enforced in equity by injunction because damages at law would be inadequate; specific performance of the restrictive covenant is required to protect the plaintiff in his enjoyment of his right *in rem* created by the covenant; he is entitled to the real thing, an interest in land, for which damages at law would be an inadequate substitute. Easements arising by grant, implied grant or by prescription, the conventional easements of the law of property, as distinguished from restrictive easements arising by covenant, are protected by injunction in equity where their violation or threatened violation will be continuous or regularly repeated, to prevent a multiplicity of suits in tort at law.[2] Restrictive covenants, however, are enforced by applying the remedy of specific performance of the defendant's negative covenant. Though they exist as easements at law, and run with the land for that reason, the

1 Peck v. Conway, 119 Mass. 546 (1876); Post v. Weil, 115 N. Y. 361, 22 N. E. 145 (1889). See Walsh, Property (2nd Ed.), 597, 691, 692 n. 4.

2 See *ante* Ch. VII.

only remedy at law is damages; whether recovered for breach of the covenant or for violation of the plaintiff's property right the measure of the plaintiff's recovery will be the same. They are regularly enforced at law by action for breach of covenant, though it would seem that an action on the case would also lie for violation of the plaintiff's incorporeal property right. It is natural, therefore, that equity should protect the plaintiff's property right in these cases by enforcing specific performance of the negative restrictive covenant rather than by an injunction against the tort.

As between the original parties the negative covenant will always be enforced at law by the recovery of damages, and by specific performance in equity where damages will be inadequate because the defendant's acts threaten to deprive the plaintiff of his property right. In all the cases considered up to this point equity gives specific relief in protection of purely legal rights as in the usual cases of specific enforcement of executory contracts.

Equitable easements arise in cases where the restrictive covenant or contract does not create an easement or right *in rem* at law, and therefore does not run with the land at law to bind subsequent owners who succeed to the covenantor by conveyance, devise or inheritance. As such persons are not parties to the covenant, and as the covenant does not bind them as running with the land, they hold the property entirely free of the restriction at law, even though they take without paying value and with full notice of the covenant. In equity, however, an equitable right *in rem* arises in favor of the covenantee, his heirs and assigns, when the parties intended that the restriction should bind the estate of the covenantor or promisor for the benefit of the land of the covenantee or promisee. The use of the term "covenant" in these cases is hardly justified, because the promise may be without seal or by parol. Equity creates a right *in rem* in favor of the promisee for the same reasons that cause the like creation of an equitable estate in the purchaser under an executory contract of purchase, and an equitable mortgage in a lender who makes a loan relying on an agreement that the property in question shall be security for the loan. This is explained by the maxim, Equity treats that as done which has been agreed to be done and which ought to be done,

the same principle which underlies the doctrine of equitable conversion. This maxim does not exactly express what equity does. Thus a purchaser of land becomes at once owner of the land in equity when the contract is made, not at the time for performance when the promise to convey should be performed, and the equitable mortgage arises at once when the loan is made on the security of the borrower's agreement that certain property should be security therefor, whether with or without a formal agreement to execute a mortgage. There is nothing "agreed to be done" or which "ought to be done" prior to the time for closing the contract of sale or the contract to give a mortgage, and if no formal mortgage is agreed to be given in the latter case, nothing is "agreed to be done" except the actual existence of the lien as security for the loan. The trust arising in the vendor-purchaser relation, as we have seen, depends on treating the contract to sell as a transfer to the purchaser of substantial dominant ownership, since the purpose is that the land shall be his, reserved and protected for him exclusively from the date of the contract.[3] In the equitable mortgage cases, where the lender makes the loan in reliance upon the borrower's promise that certain property, real or personal, shall be security for its repayment, the land *ipso facto* becomes security therefor because the parties so intend, and justice demands that their intent be made good in fact, since otherwise the borrower would be without remedy for his loss of security, his only remedy at law being an action on the unsecured loan.[4] In the same way equity declares that these contracts for restrictions, though invalid at law as creating easements because of defect of form or for any other reason, shall be given effect as the parties intended as actual restrictions in equity. In all of these cases the equitable interest of the purchaser, mortgagee or covenantee is cut off, like all equities, if the legal title to the property involved is conveyed to a purchaser for value without notice. These equitable easements developed, as we shall see in examining the cases, on the theory of the specific enforcement of negative contracts, and it was natural that the equity of the covenantee should be regarded as a personal right, binding on a purchaser

[3] See ante § 96.

[4] See § 24, *ante*, as to equitable mortgages.

with notice or upon a volunteer taking the land without payment, because it would be unconscionable for such subsequent takers to violate the equitable right of the covenantee.[5] The real nature of the covenantee's right, existing in fact, was bound to break through the crust of technical reasoning, and it was finally definitely decided,[6] and is now generally recognized, that restrictive covenants or promises enforceable only in equity are equitable rights *in rem* which run with the land where the parties so intend, binding all subsequent takers except purchasers for value without notice. All subsequent takers of the property, therefore, take subject to the restriction unless they are able to prove that they are purchasers for value without notice. The burden is not on the covenantee to prove that such subsequent takers took with notice of his equity and are bound by it for that reason.

§ 100. Development of Equitable Easements Under the Cases. The law on this subject seems to be built upon Tulk v. Moxhay.[7] The court held that a covenant in a deed between grantor and grantee restricting the grantee from building upon or using the premises except as an open garden and pleasure ground was enforceable in equity against the covenantor's grantee. In answer to the argument that the covenant would not run with the land, and therefore the defendant as grantee of the covenantor was not bound, the court said that whether it ran with the land at law or not was immaterial because in either event equity would restrain the grantee from breaking it, since he acquired title to the land with notice of the covenant. It seems clear enough under modern cases that a restrictive ease-

[5] See *ante* § 19, note 12, as to basis of doctrine of purchaser for value without notice in these and other cases, referring to the opposing positions of Ames and Huston.

[6] In re Nisbet & Pott's Contract [1906], 1 Ch. 386, 409, Maitland, Equity, 165–170; Walsh, Prop. (2nd Ed.), 693. n. 7a.

[7] 2 Phillips 774, 41 Eng. Rep. 1143 (Chan. 1848), 2 Walsh, Cas. Prop., 1089. The court said: "Nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken . . . . if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

ment good at law arose in this case, and that it would run with the land at law.[8] It is clear that the court proceeded on the theory of specific enforcement of the negative agreement, which in good conscience should be enforced against the defendant because he purchased with notice of the plaintiff's rights under the contract, and the case has no direct reference to an equitable easement, though the statement quoted in the note referring to an equity "attached to the property by the owner" goes far in that direction. In a leading American case involving restrictive agreements which did not run with the land at law, the court declared that they were enforceable against a subsequent taker with notice "on the principle that, as in equity that which is agreed to be done shall be considered as performed, a purchaser of land with notice of a right or interest in it subsisting in another is liable to the same extent and in the same manner as the person from whom he made the purchase. . . . It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform."[9] The nature of the plaintiff's interest as a right *in rem* is clearly involved in the first part of the statement quoted, and put upon the same reason which is the basis of the equitable interest of a purchaser of land under an executory contract and of an equitable mortgagee, but the latter part of the statement indicates that specific performance of the contract as a personal right, binding on the taker with notice because justice demands it, is the basis of the plaintiff's right.

Probably the most usual situation involving equitable easements is a real estate development in which common restrictions are placed upon all the lots or plots into which the development is divided, intended to bind each lot for the benefit of each and all of the others, each individual lot being bound by the restriction in favor of every other lot, and at the same time receiving the benefit of the restrictions as they bind the other lots. On the conveyance of one of these lots by deed containing covenants against nuisances, against using the property for business purposes, against erecting any structure except a dwelling for one

8 See cases in notes following.

9 Whitney v. Union Ry. Co., 77 Mass. (11 Gray) 359, 363, 364 (1858).

family, providing a set-back from the street to be common to all the lots, limiting the building of garages or stables to be used in connection with the houses, and many other similar restrictions intended for the common benefit of all purchasing such lots, the restrictions arise as easements at law binding the lot conveyed as the servient estate in favor of the rest of the land retained by the grantor as the dominant estate. On the conveyance of a second lot the deed containing like covenants binds that lot in the same way for the benefit of the remaining lots, and so on as other lots are sold. The purchaser of each lot, except the first, gets with his lot the benefit of these restrictive easements created as appurtenant to his lot by all prior conveyances of other lots, since his lot is part of the land which remained with the grantor for the benefit of which the restrictions in all prior conveyances of other lots were made. The original grantor, however, in the usual case, does not give reciprocal covenants binding the land so retained by him for the benefit of the land conveyed. Nevertheless the intent that such land should be bound is clear where all conveyances are made with like restrictions constituting a common scheme. Equity gives effect to this intent by enforcing the restrictions as binding upon the land retained by the developer to the same extent that they bind the land sold by him, and subsequent purchasers of lots from the developer takes subject to this burden which equity imposes, just as they take the benefits of the express restrictions on plots already sold unless they take without notice of the common scheme. The express restrictions are enforceable at law as easements at law, created by instrument in writing satisfying all requirements for the creating and transfer of interests in lands. The reciprocal implied restrictions, implied from the facts establishing the existence of a common scheme for the mutual advantage of all, and enforced by equity because the parties so intend, are void at law because the formal requirements of conveyances of legal estates in land are lacking. Because the land is bought and paid for on the basis of the existence of these restrictions as easements for the benefit of the lots sold as against the lots retained by the developer, equity enforces them as though they had been created in due form at law, just as equity enforces an equitable mortgage where the loan is made based on an agreement that the property should be security for the

loan, though the required formalities of a legal mortgage are absent.[10] But a subsequent purchaser of a lot for value and

[10] Barrow v. Richard, 8 Paige 351 (N. Y. 1840), is one of the earliest American cases so holding. The complainant's lot was sold before the defendant's lots by Mercein, the developer of the tract. The court said: "And if lots Nos. 12 and 13 had been conveyed to the defendants, or to those under whom they claim, while Mercein was still the owner of lot No. 11, I am not sure that any technical difficulty would have arisen in the maintaining an action at law, upon the covenants of the grantees of the two first mentioned lots by the complainant, as the subsequent purchaser of lot No. 11, and the assignee of the covenants for an easement for the benefit of that lot." The court held that though no action at law could be maintained by the plaintiffs for breach of defendants' covenants since the plaintiffs were not parties thereto, yet equity will enforce the covenant in the plaintiffs' favor because made for the benefit of all the other lot owners. In Tallmadge v. East R. Bank, 26 N. Y. 105 (1862), mere verbal representations and the exhibiting of a plan to prospective purchasers, including the predecessors in title of both parties, that all the lots on the plan would always remain subject to a set-back of eight feet for all houses to be erected thereon, several houses having been built by the vendor with a set-back of eight feet, resulted in equitable easements restricting each lot by a set-back of eight feet in favor of all the other lots. The court said: "Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis in equity and good conscience to use and dispose of all the remaining lots so that the assurance upon which Maxwell and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that anyone taking subsequently from Davis any one or more of the remaining lots with notice . . . would not stand in a different situation from Davis, but would be bound by that equity."

In Evans v. Foss, 194 Mass. 513, 80 N. E. 587 (1907), the law of equitable easements is well expressed: "It is a familiar principle of law . . . that when one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed, which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement, which will be enforced in equity against the grantee of one of the other lots, although there is no direct, contractual relation between the two. Through the common character of the deeds the grantees are given an interest in a contractual stipulation which is made for their common benefit."

See also Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556 (1893); Weigman v. Kusel, 270 Ill. 520, 110 N. E. 884 (1915); Linzee v. Mixer, 101 Mass. 512 (1869); De Gray v. Monmouth Beach Co., 50 N. J. Eq. 329, 24 Atl. 388 (1892); Booth

without notice of the common scheme takes free of the equity, which is cut off in such cases exactly as the equity of an equitable mortgagee or of a purchaser under an executory contract to buy land, or any other equity, is cut off by transfer of the legal title to a purchaser for value without notice.[11]

It seems clear from the cases cited and discussed in the preceding notes that equitable easements or restrictions developed as part of the law of specific performance of contract, and that restrictions created by covenant or contract, whether they are enforceable at law or not, are enforced in equity by specific performance without reference to whether the covenant created legal or equitable easements where the defendant took with notice. The remedy at law is inadequate as the plaintiff is threatened with the destruction of a property right of value, and that property right exists just as truly where the restriction does not amount to an easement at law though enforceable in equity in the given case, as in cases of easements at law created with full formality. Equitable easements are, therefore, property rights in equity and are protected as such, though at law they are void. In a leading English case their nature as property was directly involved, the court holding that a man acquiring title by adverse possession, by a new and independent title arising out of his possession and the extinguishment of the title of the former owner by the statute of limitations, nevertheless took subject to a prior restriction of this kind, as he was not a purchaser for value.[12] It is not a personal equity binding a

v. Knipe, 225 N. Y. 390, 122 N. E. 202 (1919); Barnett v. Vaughan, 134 App. Div. 921, 119 N. Y. Supp. 45 (1909); Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291 (1894). See also cases in note 12 following.

11 See cases in preceding note, also in note following.

12 In re Nisbet & Pott's Contract [1906], 1 Ch. 386, 409. That they are rights *in rem*, not merely personal contractual rights, and run with the land unless cut off by conveyance of the legal title to a purchaser for value without notice is now generally recognized. In Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917), a statute providing that the land court might register title to the land free of such restrictions where their enforcement "would be inequitable," and providing for the fixing and payment of any damage resulting from this extinguishment, was held to be unconstitutional as taking away a vested property right not for any public use. After quoting several cases the court said: "It follows from these and other decisions that such an equitable restriction is a property right in the

subsequent taker only because he has notice of it. It is an equitable property right binding the land as against all subsequent takers except a purchaser for value without notice.

If a man who purchases several lots of a tract affected by restrictions under a common plan, as above described, sells the lots to different purchasers without any reference in the deeds conveying the lots to the restrictions, such purchasers taking with notice of the common scheme are bound by them, so that they mutually bind each lot in favor of the others. The difficulty is that the easements, whether legal or equitable, cease to exist while the first purchaser holds the lots, as between the lots so held, since a man cannot have an easement in his own property. But the lots are bound by and have the benefit of these mutual easements as between them and other lots embraced within the common plan, and the intent that these restrictions shall apply, as between these lots so held by a single purchaser when he separates their ownership by selling them separately to different purchasers, is so clear that the courts have not hesitated to give

person in favor of whose estate it runs and to which it is appurtenant. That has been expressly recognized or impliedly assumed in numerous decisions and is not now open to doubt.'' Citing Wilson v. Mass. Inst. Tech., 188 Mass. 565, 75 N. E. 128 (1905); Stewart v. Finkelstone, 206 Mass. 28, 92 N. E. 37 (1910), and other cases.

In Withers v. Ward, 86 W. Va. 558, 104 S. E. 96 (1920), in enforcing equitable restrictions between subsequent purchasers of lots sold originally by the same vendor, the court said: ''As before stated, these covenants run with and belong to the land. The right to have them enforced, so far as the plaintiff is concerned, is one that is attached to his real estate. It is a part of his real estate, and when the owner of another lot in the subdivision attempts to violate one of these restrictions he is taking from all of the other owners part of their estate. He is not merely committing a trespass upon it. He is destroying it, and it is very well settled that equity will take jurisdiction by injunctive process to prevent one from inflicting permanent injury upon the real estate of another.''

See also, Cole v. Seamonds, 87 W. Va. 19, 104 S. E. 747 (1920); Maitland, Equity, 165, *et seq.* In Cole v. Seamonds, *supra*, the court refused to enforce a covenant not to use the property for business purposes against a subsequent grantee because not reserved for the benefit of adjoining land for residence purposes, nor to prevent competition with business on adjoining land, but solely to control the use of the property so as to exclude undesirable owners, in a remote way possibly benefiting the plaintiffs in their extensive mining operations. This could not be an easement.

effect to it by implying contracts to that effect, creating equitable easements as between these lots on the separation of their ownership for exactly the same reasons as in the other cases of equitable easements discussed above.[13] The easement, having thus come into existence, runs with each of the lots by way of mutual benefit and burden, just as in the other cases explained heretofore, until the legal title is transferred to a purchaser for value without notice, or until the easements are extinguished by mutual release, abandonment or otherwise.

In all these cases it must appear affirmatively that the restrictions are a common scheme of development, intended for the mutual benefit of the lots sold by the realty developer.[14] If no part of the land is to be retained for the permanent use of the developer, who sells all the property with common restrictions in all the deeds, the inference is strong that mutual restrictions for the benefit of all the purchasers were intended.[15] Where it appears that the restrictions were reserved solely for the benefit of the vendor, with the right in him to release or modify them as he pleases, they can be enforced only by him, as personal covenants.[16]

Where such covenants are obviously for the benefit of adjoining property, though the property is not referred to in the deed, easements for the benefit of such property are held to arise.[17]

Though mutual restrictive covenants of the kind discussed above are the most numerous and important group, restrictive

13 Winfield v. Henning, 21 N. J. Eq. 188 (1870).

14 See cases *supra* notes 10–13.

15 Nottingham &c. Co. v. Butler, 16 Q. B. D. 778 (1886); In re Birmingham & Dist. Land Co. [1893], 1 Ch. 342, 349 [the court saying that it is a question of fact depending on the circumstances of each case, whether a personal covenant for the protection of the vendor only, or for the common benefit of all purchasers was intended, and the retention of a part by the vendor, while important, is only an element to be taken into consideration with other circumstances].

16 Clark v. McGee, 159 Ill. 518, 42 N. E. 965 (1896), [varied restrictions in different deeds]; Sharp v. Ropes, 110 Mass. 381 (1872); Hamlen v. Keith, 171 Mass. 77, 50 N. E. 462 (1898); Equit. Life Ins. Soc. v. Brennan, 148 N. Y. 661, 43 N. E. 173 (1896); Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543 (1892); Hutchinson v. Thomas, 190 Pa. 242, 42 Atl. 681 (1899).

17 Peck v. Conway, 119 Mass. 546 (1876); Tobey v. Moore, 130 Mass. 448 (1881); Phoenix Ins. Co. v. Cont. Ins. Co., 87 N. Y. 400 (1882); Elec. City Land &c. Co. v. West Ridge Coal Co., 187 Pa. 500, 41 Atl. 458 (1898).

covenants enforceable on the same principles by specific performance in equity are found in many other situations. Thus a sublessee of a tenant bound by a restrictive covenant in the original lease will be restrained in equity from a breach of the restriction if he took the sublease with notice.[18] Another form of restrictive covenant enforced by equity on the same principles is a covenant made by a purchaser of land not to compete with the grantor, his heirs and assigns, by using the land granted in the carrying on of a business which would compete with the business conducted by the grantor on land retained by him. A covenant not to compete will be enforced in equity, as we have seen, between the original parties, irrespective of whether a transfer of land is involved or not, because damages at law would be inadequate.[19] In the cases now referred to the covenant attaches to the land as a restriction which runs with the land so as to bind a subsequent purchaser with notice, or any subsequent taker who is not a purchaser for value without notice.[20] Some cases hold that a subsequent purchaser of the parcel intended to be benefited cannot enforce the covenant, as the benefit is personal, not directly touching or affecting the land retained by the covenantee,[21] but these cases overlook the fact that the entire value

18 Hall v. Erwin, 37 Ch. D. 74 (1887); [though the tenant will not be compelled to take action against the subtenant]; Ashby v. Wilson [1900] 1 Ch. 66.

19 See § 67, note 40, *et seq.*, *ante*.

20 Luker v. Dennis, 7 Ch. D. 227 (1877); Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335 (1887); Bald Eagle Valley R. Co. v. Nittany Valley R. Co., 171 Pa. 284, 33 Atl. 239 (1895).

21 Norcross v. James, 140 Mass. 188, 2 N. E. 946 (1885); Brewer v. Marshall, 18 N. J. Eq. 337 (1867), [covenant not to sell marl in competition with grantor's business on land retained]; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. 469 (1889); Tardy v. Creasy, 81 Va. 553 (1886).

In National Bank of Dover v. Segur, 39 N. J. L. 173 (1877), the vendor covenanted not to engage in the banking business in Dover for the benefit of the purchaser's banking business to be carried on by him in the building purchased. The court held that the covenant ran with the land at law as a benefit, since it did not contravene public policy as it would aid rather than hinder future alienation of the property. See Walsh, Property (2nd Ed.), 671–673, 695, 696.

The court distinguishes Brewer v. Marshall, *supra*, because in that case the covenant was made by the purchaser to run with the land as a burden. If made for the personal advantage of the vendor covenants creating burdens are void, but not when they create easements for the benefit of a dominant estate.

of the covenant is in the advantage which it gives to the owner of the land intended to be benefited in his use of the land for his business, and on the transfer of the land with the business to another, no benefit from the covenant will exist in favor of anyone unless it can be enforced by the grantee as an easement running with the land. The intent that it should so run is clear, and nothing at law or in equity prevents its running as a benefit to the dominant estate and a detriment to the servient estate. The objection that it does not touch or concern the land is contrary to the fact. The refusal of the law to permit burdens to run with the land because they interfere with freedom of alienation has no application where the burden exists as an easement for the benefit of a dominant estate.[22]

In a leading New York case [23] one Gollner induced plaintiffs to buy his land at a profit to him of $6000 in order to stop him from erecting an apartment house thereon which would damage neighboring property of the plaintiff, Gollner covenanting not to erect any apartment house in the neighborhood. Later he bought land across the street and began the erection of a flat, thereafter conveying to his wife, and continuing the erection of the flat as her agent. The court granted an injunction against the wife since she took with notice. The restriction attached when Gollner purchased the property, and bound the wife since she took with notice, a good illustration of the elasticity and breadth of equitable restrictions and their enforcement.

One of the outstanding cases in which courts of equity have used their discretion to withhold equitable relief in "balancing the equities" is where changed conditions in the neighborhood make the restriction no longer of any substantial value to protect the plaintiff's property, and where its enforcement will serve only to injure the defendant. The courts generally say in these cases that equitable relief will be withheld and the plaintiff will be left to his remedy at law for damages.[24] Dean Pound says:

22 See preceding note, especially Nat. Bank of Dover v. Segur, also cases *supra* note 20. If the covenant creates an easement, legal or equitable, the easement necessarily runs as a benefit and also as a burden with the dominant and servient estates respectively.

23 Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81 (1891).

24 In Trustees of Columbia College v. Thatcher, 87 N. Y. 311 (1882), the court refused to enforce a restriction forbidding use of the property for business purposes, the character of the neigh-

"It is submitted that the sound course is to hold that when the purpose of the restriction can no longer be carried out, the servitude comes to an end: that the duration of the servitude is determined by its purpose. . . . When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination."[25]

In England it seems to be settled that negative restrictive covenants only will be enforced against subsequent takers with notice[26] but in the United States the prevailing rule is that the

borhood having been radically changed by the invasion of business houses and the building of an elevated railroad structure with a station near the property so that its value was greatly reduced for residential purposes, though fully maintained if used as business property. In making a similar decision the court said in Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892): "If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. . . . Since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without affecting the purpose for which the restrictions were originally made." To same effect see Sayers v. Collyer, 24 Ch. D. 180 (1883), 28 Ch. D. 103 (1884); Ammerman v. Dean, 132 N. Y. 355, 30 N. E. 741 (1892); De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329, 335, 24 Atl. 388 (1892), [*dicta*].

[25] Progress of the Law (1920), 33 Harv. L. Rev. at 820, 821. In McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915), the court took this view, holding that the changes in the character of the neighborhood brought the restrictions to an end, and the action to eliminate them as a cloud on title was sustained. There seems to be no precise analogy. Ways of necessity end when the dominant owner acquires another way, the easement ending because it arose by implication to continue only while the necessity which had brought it into existence should continue. Party wall easements arising for the life of the buildings end with the destruction of the buildings by fire. Walsh, Property (2nd Ed.), 603, 604, 655. Other easements do not end because they are no longer needed. It is fair to construe the original covenant creating the restrictive easement as limiting it to the period during which it has any substantial value in accomplishing the protection of the dominant property, ending by its terms when it ceases in any substantial way to accomplish its purpose. This seems the common sense of the matter and to be in accord with sound policy, eliminating meaningless restrictions as merely vexatious clouds upon title to land.

[26] Haywood v. Brunswick Bldg. Co., 8 Q. B. D. 403 (1881); Austerberry v. Oldham, 29 Ch. D. 750

burden of a covenant made in support of an easement, legal or equitable, runs with the land, though it calls for affirmative action such as the making of repairs and improvements, and will be enforced as running with the land both at law and in equity.[27] Though the covenant or contract does not run with the land at law in any particular case, if the remedy at law as between the original parties is inadequate, it would seem to follow that it will be enforced in equity by specific performance against a subsequent taker who is not a purchaser for value without notice.

It is very clear that an equitable restriction running as a servitude with the land conveyed does not arise when the covenantee does not retain ownership of neighboring land, so that no dominant estate exists. Though enforceable at law and possibly in equity as a personal contract between the original parties, such restrictions cannot run as burdens upon the land conveyed for the personal benefit of the covenantee when no easement, legal or equitable, is created for the benefit of a dominant estate.[28]

(1885); Clegg v. Hands, 44 Ch. D. 503 (1890).

27 See Walsh, Prop. § 310, and cases therein cited and discussed. In Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 41 N. E. 441 (1895), the court said: "It has also often been held elsewhere . . . that the relief granted by a court of equity is not to be limited to those covenants which are merely restrictive, but will extend to covenants to do positive acts involving the expenditure of money," citing Burbank v. Pillsbury, 48 N. H. 475; Finley v. Simpson, 2 Zab. 211; Sparkman v. Gove, 15 Vroom. 252; Maynard v. Moore, 76 N. C. 158; Georgia South. R. Co. v. Reeves, 64 Ga. 492; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Peck, 94 N. Y. 86; Kellogg v. Robinson, 6 Vt. 276.

As to specific enforcement of affirmative and negative contracts generally, see § 67, *ante*.

28 Formby v. Baker (1903), 2 Ch. 539, 2 Cook, Cas. Eq. 698. See *contra* Van Sant v. Rose, 260 Ill. 401, 103 N. E. 194 (1913). See criticisms of this case (1914), 9 Ill. L. Rev. 58, and (1914) 27 Harv. L. Rev. 493. See notes 20–22, *supra*, and text to which they relate, also Walsh, Hist. Eng. & Am. Law, 304, 307, as to history of development of covenants as benefits running with the land, and covenants as burdens not running with the land, where no tenure, easement, cotenancy or other mutual relationship as to the land is involved as between the parties.

CHAPTER XIX

DEFENSES TO SPECIFIC PERFORMANCE

§ 101. **Lack of Consideration.** It is elementary that at law a valuable consideration is a necessary element of all simple contracts, and that a consideration is not required in contracts under seal, except that in several states, as in New York, statutes have modified the law of contracts under seal by providing that the seal raises a presumption of a consideration which may be rebutted by evidence that no consideration in fact existed.[1] Equity has always refused specific performance of contracts which are void at law because of lack of consideration. Cases of parol gifts of land and of promises to convey land without consideration where the donee or promisee is induced thereby to radically change his position by moving on the land and making improvements, and working for the donor or promisor, and in other ways, in which equity compels a conveyance of the legal title to the donee or promisee, are not cases of specific performance of contracts, whatever may have been said in the opinions of the courts. The equity arising in these cases is a trust impressed upon the legal estate of the donor or promisor as a remedial fiction because the donee or promisee has been led by this parol gift or promise to so change his position that justice requires the trust in his favor, giving him the right to the transfer of the legal title. This is more perfect relief than mere restitution for expenditures because it gives to the plaintiff the specific thing which he was to receive, and on which he relied in taking possession and improving the property. It is true the courts speak of specifically enforcing the promise to make the gift, and refer to the improvements and other acts of the promisee as "consideration," though in most cases it is clear that a promise to make a gift on condition is involved, without any common law consideration to support the promise. The trust

1 1 Williston, Contracts, § 217.

is enforced by specifically enforcing the promise or giving effect to the gift as if the promise or gift were good.[2]

Prior to Lord Cottenham's decision in Jefferys v. Jefferys[3] there seems to have been no doubt that a contract under seal by way of settlement or otherwise would be specifically enforced.[4] If good at law when under seal without a consideration, there was no good reason why specific relief in equity should be withheld. But in the case referred to above, Lord Cottenham decided that a covenant to surrender certain lands to trustees for the benefit of the covenantor's children would not be enforced in equity because of the absence of a common law consideration. Since that time this decision has been generally followed as the rule.[5] It is settled practically everywhere that an option under seal to sell, acted on by the holder of the option, results in a contract to sell, the consideration for the promise to convey being the promise to pay the price, which will be specifically enforced.[6] This surely is not an exception to the rule just stated.

2 See § 81, *ante*.

3 1 Cr. & Ph. 138, 41 Eng. Rep. 443 (Chan. 1841).

4 See Pound, Consideration in Equity (1919), 13 Ill. L. Rev. 667.

5 Pound, *ibid.*, note 4, *supra;* Pound, Progress of the Law (1920), 33 Harv. L. Rev. 834, 835, and cases cited, n. 99, stating that in most of the American cases cited for this doctrine there was no contract at law, while most of the cases in which a valid contract existed were actually decided on other grounds. See Barrett v. Geisinger, 179 Ill. 240, 249, 53 N. E. 576 (1899); Lamprey v. Lamprey, 29 Minn. 151, 12 N. W. 514 (1882); Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073 (1891); Graybill v. Braugh, 89 Va. 895, 17 S. E. 558 (1893); [but see *contra* Watkins v. Robertson, 105 Va. 269, 54 S. E. 33 (1906); 1 Ames, Cas. Eq., 261 n. See also additional cases cited Pound, *op. cit.* 835 n.

6 O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602 (1896); McMillan v. Ames, 33 Minn. 257, 22 N. W. 612 (1885); Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4 (1888); Watkins v. Robertson, note 5, *supra.* In Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654 (1918) the court said in referring to opposing decisions holding that offers under seal may be withdrawn before acceptance: "Some of these, as pointed out in Watkins v. Robertson, *supra,* are dependent on statutes which change or modify the effect given to seals under the principles of the common law. In others, there being nothing in the record to present it, the mind of the judges was not specially called to the distinctions existent and usually observable between a mere offer to sell without consideration and without seal and one that is effective as a binding agreement by reason of the seal."

If the offer is irrevocable at law when under seal, a valid contract

The option is not enforced in equity—at law the option is an offer which cannot be revoked, so that the contract to sell arises on the exercise of the option in spite of any attempted revocation —equity simply enforces the contract which arises on the exercise of the option, and that contract is supported by a valid consideration.

The cases refusing specific performance to contracts under seal good at law though without a valuable consideration must be regarded as the ill-considered following of an ill-considered English case which in turn was opposed to prior authority. There is a growing weight of authority which is opposed to Jefferys v. Jefferys and the cases which have followed it.[7] There never has been any valid reason why specific relief should be withheld in these cases. Contracts under seal have been valid at law without consideration since the 13th century. Surely equity should not seek to extend the technical doctrine of consideration. Good faith and fairness demand that a promise be kept in transactions involving property or business, and the formality of a written instrument under seal has always been a sufficient assurance of the importance of the transaction to justify its enforcement as the parties intended without requiring the technicality of a consideration of value. The refusal of equity to enforce an unfair and unjust bargain because of the inadequacy of the consideration presents another problem altogether, and

arises on acceptance within the time fixed by the offer. Equity has nothing to do with this. When the resulting contract has come into existence the price to be paid is the consideration for the conveyance, and the promise to pay is the consideration for the promise to convey, eliminating the question of absence of consideration in the action for specific performance. Equity enforces the resulting contract, not the option.

7 See McCrilles v. Sutton, 207 Mich. 58, 173 N. W. 333 (1919), discussed by Pound, Progress of the Law (1920), 33 Harv. L. Rev. 835. A contract under seal that M. should receive on the death of the covenantors the same share that he would have received had he been legally adopted was specifically enforced though without a common law consideration. The recitals in the instrument that M. had been given them to adopt, and they mistakenly had thought they had adopted him; that he had served them faithfully, etc., constituted no valuable consideration, nor did a trust of any kind exist. A contract, good without consideration because under seal, was enforced in equity, as it should be, because of the inadequacy of damages at law.

turns on the reserved power of equity to withhold relief in hard cases where because of the special facts in the case it may be more just to leave the parties to the remedy of damages at law.[8]

§ 102. Laches and the Statute of Limitations. Statutes limiting the time in which actions in equity may be brought were never enacted prior to modern times. That matter was regulated in equity by the doctrine of laches. If the plaintiff in equity has delayed unreasonably in seeking equitable relief to which he was entitled, and his delay has been accompanied by important changes in the value of the property, or other changes in the situation of the defendant which would make the delayed enforcement of the contract or other relief unjust and unfair, equity will deny the relief to which the plaintiff otherwise would be entitled. The doctrine of laches, therefore, is an instance of the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.[9]

In most of the cases equity denies relief because of laches where unreasonable delay is accompanied by such changes as

[8] See § 104, *post*.

[9] Brooks v. Muckleston, [1909] 2 Ch. 519; Peters v. Delaplaine, 49 N. Y. 362 (1872); Groesbeck v. Morgan, 206 N. Y. 385, 99 N. E. 1046 (1912), ["As was suggested by Chief Judge Church (Peters v. Delaplaine, *supra*) quoting the language of Lord Alvanley in Milward v. Earl of Thanet, 5 Vesey 720 n, a purchaser seeking specific performance must be 'ready, desirous, prompt and eager' "). In Castner v. Walrod, 83 Ill. 171 (1876), the court said: "The principle that must control a case of this character has been clearly stated by Lord Camden in Smith v. Clay, 3 Brown's Chancery Reports, in these words: 'That a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights for a great length of time. . . . Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.' "

In Groesbeck v. Morgan, *supra*, Judge Willard Bartlett said: "No doctrine of equity jurisdiction is better settled than the rule that specific performance is not a strict legal right, and is never granted when the lapse of time renders such relief inequitable in its consequences, or, as many judges have phrased it, 'against equity and good conscience.' "

would make enforcement of the contract inequitable and unfair.[10] There can be no doubt, however, that laches may be established as a defense, and equity will refuse relief on that ground, though no important change of position has taken place, if the delay on the plaintiff's part has been very extended. It must be remembered that the application of this doctrine involves the exercise of judicial discretion in determining whether or not relief to which the plaintiff would otherwise be entitled should be withheld because of his delay. In these cases courts of equity

[10] In Groesbeck v. Morgan, note 9, *supra,* the defendant was in default because of liens not cleared away on the adjourned day for closing. A few months later the liens were cleared away by defendant, but the plaintiff waited nearly five years thereafter before starting the action for specific performance, the property increasing in value from $2,750 to $15,000 during this time. The court held this delay to be laches. "No excuse is offered for the delay, while the effect of it now is to make the defendant convey to the plaintiff land which has increased in value by many thousands of dollars. As was said of a purchaser by Chancellor Kent in Benedict v. Lynch, 1 Johns. Ch. 370, 378:—'He cannot be suffered to lie by and speculate on the rise of the estate.' See also Schmidt v. Reed, 132 N. Y. 108, 116."

In Peters v. Delaplaine, note 9, *supra,* the delay was for seventeen years and the value of the property had grown from $30,000 to $300,000, both of the original parties had died, and the title had passed to many persons, portions being held under trusts of various kinds. "The situation of the parties, and the condition and value of the property have so greatly changed . . . that it is not a case for a specific performance within the rules governing courts of equity in administering this branch of their jurisdiction."

In Cook v. Stafford, 86 Mich. 163, 48 N. W. 785 (1891), the court said: "Delay, or even great delay, is not always a reason for courts of equity to refuse to enforce a written contract specifically. Each case must depend upon its own circumstances, and the court must be influenced and controlled by those equitable principles which, while doing justice to one will not do injustice to others. Here no sufficient reason is shown for the delay. Complainant has suffered 36 years to pass without asking for a performance of the contract, and until after the lips of the other party to the contract have been closed by death, and he can no longer tell why it has not been performed. Courts of equity have frequently refused relief under such circumstances. . . . Combs v. Scott, 76 Wis. 662; Anthony v. Leftwich, 3 Rand. (Va.) 238; Williams v. Williams, 50 Wis. 311."

See, also, Holgate v. Eaton, 116 U. S. 33 (1885); Findley v. Koch, 126 Ia. 131, 101 N. W. 766 (1904); Green v. Reder, 199 Mich. 594, 165 N. W. 807 (1917); Reddish v. Muller's Admr., 27 N. J. Eq. 514 (1875).

are not bound by hard and fast rules like the statute of limitations at law. Nevertheless there has been a strong tendency to apply by analogy the corresponding limitation at law fixed by statute upon corresponding legal actions, and to hold that delay beyond that period will bar the action in equity without much attention to whether an important change in the position of the parties has taken place or not.[11] But this does not prevent the court from applying the doctrine of laches and denying relief on that ground though the delay has been much less than the corresponding limitation upon the law action where changes have taken place which make specific performance or other equitable relief unfair and unjust.[12] The matter rests in the sound discretion of the court.

In New York and the 29 other states and territories which have followed New York in merging law and equity under the Code, that part of the Code providing for limitations of actions fix definite periods of limitation for some of the more important actions in equity, such as actions to redeem and to foreclose. A blanket clause fixing ten years or other period applies to all other actions not specifically covered by other provisions. Most of the equity actions, such as the action for specific performance, falls within this section. Of course the statute fixes the limit of the period within which the action must be brought,

[11] In Castnor v. Walrod, note 9, *supra*, after stating that the question of laches turns on the facts of each case, the court added: "But when the statute has fixed the period of limitation under which the claim, if interposed in a court of law, would be barred, courts of equity, by analogy, follow the limitation followed by law." To same effect, see Updike v. Mace, 194 Fed. 1001 (1912); Barnes v. Born, 133 Ind. 169, 30 N. E. 509 (1892); Sioux City, etc., R. Co. v. O'Brien County, 118 Iowa 582, 92 N. W. 857 (1902); McVicar v. Filer, 31 Mich. 304 (1875); In re Bickel's App., 86 Pa. 204 (1878).

[12] See cases in last two notes. In Kelley v. Boettcher, 85 Fed. 55 (1898), the court said with reference to following the analogy of limitations at law (p. 62):—"Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous Statute of Limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

eliminating any discretion in the court to permit the action after the period of the statute has elapsed, provided the defendant has pleaded it as a defense. But these statutes in no way interfere with the right of the courts to deny relief because of laches where delay by the plaintiff for a shorter period than the statute fixes is accompanied with changes which would make enforcement of the contract inequitable.[13]

[13] For the application of the Code provisions in New York, see Peters v. Delaplaine, note 9, *supra*. The court held that the action for specific performance is an action in equity quite different from the action on the contract at law for damages, in that facts other than the existence of the contract at law are involved in establishing the right to specific performance, and therefore the ten year period applying to miscellaneous equity actions applied to the case rather than the twenty year limitation of actions on specialties or the six year period applying to actions on simple contracts. This is in accord with the well-settled rule that the action to foreclose a mortgage is entirely distinct from the action on the mortgage debt, so that the barring of that action by the six year limitation does not affect the action of foreclosure which is subject to a limitation of twenty years. Pratt v. Huggins, 29 Barb. 277 (N. Y. 1859). Borst v. Corey, 15 N. Y. 505 (1857), recognizing the rule in mortgage cases as stated above, nevertheless held that the barring of the action for the purchase money at law barred also the action in equity to enforce the vendor's lien, because the lien is implied by law as security for the debt. "It must co-exist with the debt and cannot survive it." This position was criticized in Hulbert v. Clark, 128 N. Y. 295, 300, 28 N. E. 638 (1891). See 2 Walsh, Cas. Prop., 1188–1191. In Winne v. Queens Land & Title Co., 166 App. Div. 314, 149 N. Y. Supp. 664 (1914), the court held that the running of the statute against the action at law barred the action for specific performance, saying: "His remedy in equity is concurrent with his remedy at law, and therefore, when his remedy at law is barred, his cause of action in equity is barred also." This is clearly *contra* to Peters v. Delaplaine, but in accord with Borst v. Corey, *supra*. That the action in equity is in the nature of an action *in rem*, brought to assert the plaintiff's equitable estate in the land, in which service by publication is good for that reason, and differs fundamentally in other respects from the action at law, as explained in Peters v. Delaplaine, is sufficiently clear, and the Winne case is, therefore, wrongly decided.

In Groesbeck v. Morgan, note 9, *supra*, the court said, following quotation in note 10, *supra*: "The defense of laches in a suit for specific performance is to be considered wholly independent of the statute of limitations. Although the action is brought within the period prescribed by the statute, it may have been so delayed as to preclude the granting of equitable relief, and, if so, the complainant must be relegated to his action at law for damages." To the same

The doctrine of laches is closely related to the matter of enforcement by the party in default where time is not of the essence, or where time is of the essence, but equity relieves the party from his default by decreeing specific performance because he has changed his position by entering and making improvements or by paying a considerable part of the purchase money. If the plaintiff not in default must not be guilty of laches in bringing his action against a defaulting defendant, it is clear that if the defaulting party is plaintiff he must have acted with reasonable promptness in bringing his action. Though time is not of the essence, it is very certain that he must act with reasonable promptness, even though the other party does not make time of the essence by notice, as explained in an earlier chapter.[14] Where the contract is so far executed that a substantial forfeiture by the defaulting purchaser is involved, the vendor's action is by foreclosing the purchaser's equity, as explained heretofore.[15] If the purchaser is in possession under a contract so far executed on his part, or under which he has so substantially changed his position, that his equitable interest will be protected from forfeiture, he is in the position of any beneficiary of a trust in land who is in possession. A donee or promisee of a parol gift or promise to make a gift, with the right to enforce the promise because of his change of position, is also a beneficiary of an implied trust, as we have seen,[16] and the cases hold that the statute of limitations does not begin to run against the beneficiary until the trustee has ousted him, with express notice to him of the trustee's repudiation of the trust. He is in possession of his own property, and he has a constant right to compel the vendor to convey to him the technical legal title against which the statute does not begin to run until the trustee has ousted him in repudiation of the trust.[17]

effect, see Patterson v. Hewitt, 195 U. S. 309 (1904); Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456 (1906).

[14] See § 73, *ante*.

[15] See §§ 74, 91, *ante*.

[16] See § 81, *ante*.

[17] Raymond v. Hattrick, 104 Wash. 619, 177 Pac. 640 (1919), discussed by Pound, Progress of the Law (1920), 33 Harv. L. Rev. 953. Dean Pound says the action is on the same basis as a suit to quiet title, the plaintiff's right arising out of a continuing situation giving him an ever fresh right to sue at any time to which laches and the statute of limitation can have no

§ 103. Misrepresentation and Mistake as Defenses to Specific Performance. We shall see in the following chapter that fraud may be set up as a bar to the enforcement of any simple contract both at law and in equity, and by the aid of statutes permitting equitable defenses in law actions the same rule now applies to contracts under seal as well; that either party may rescind for the fraud of the other; that to recover damages in tort for fraud and deceit knowledge of the falsity of the misrepresentation must be brought home to the defendant, either by direct evidence of his knowledge or by proof of circumstances which would give such notice or knowledge to the average man; that a contract may be rescinded at law as well as in equity for false representations of material facts irrespective of guilty knowledge on the part of the person who made the misrepresentations because of the unfairness of enforcing the contract when there had been no true meeting of the minds of the parties.[18]

Misrepresentation made honestly, and therefore not amounting to fraud at law, may be a defense to specific performance even though rescission cannot be had at law or in equity. Wherever rescission may be had for misrepresentation it is obvious that specific performance can not be enforced by the person who made the false statements. Nearly all cases of material misrepresentations give the right to rescind, destroying all right to enforce the contract either at law or in equity.[19] There remains a narrow borderline field of conduct involving lack of good faith not amounting to fraud either as a tort or as a basis of rescission which will cause equity to deny specific performance of a contract secured by the aid of such tactics. These cases are another application of the reserved power of equity to withhold relief usually given where justice demands that it be withheld because of special and unusual facts, like the laches cases discussed in the preceding section. Failure to disclose an important fact affecting the value of the property, and taking advantage of the other party's ignorance of that fact, is the most frequent case of this kind. Where the plaintiff induced the defendant to sell her property, knowing that it was about to be taken for the use of a railroad company which greatly increased its value,

application. In other words he is a beneficiary of a trust in possession.

[18] See Chap. XX, *post*.

[19] *Ibid.*

without disclosing that fact, and induced her to make a hurried decision without consulting her usual advisers, though she was an uneducated woman unfamiliar with business transactions, the court denied specific performance leaving the plaintiff to his action for damages though no fraud existed for which rescission could be enforced.[20] So failure to disclose the existence of valuable coal deposits by which the purchaser got a contract for the land for $120, though its value was $2000, resulted in the denial to him of specific performance for the same reason, the inadequacy of the consideration being a contributing cause to that result.[21] In all of these cases the unfairness of the resulting contract was a strong contributing factor in determining the exercise of the court's discretion.

Many of the cases in which the courts have refused specific performance because of misrepresentations, basing their decision on discretionary withholding of equitable relief, are really cases in which specific performance could not be given because

20 Branaghan v. Malaney, 200 Mass. 46, 85 N. E. 839 (1908), 2 Cook, Cas. Eq., 756.

21 Missouri River &c. R. Co. v. Brickley, 21 Kan. 275 (1878), 2 Cook, Cas. Eq., 159.

In Margraf v. Muir, 57 N. Y. 155 (1874), Earl, J., said: "While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot, and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value. When a contract for the sale of lands is fair and just . . . it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in cases of fraud and mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or when such a decree would be inequitable under all the circumstances."

To same effect, see Byars v. Stubbs, 85 Ala. 256, 4 So. 755 (1888); Woolums v. Horsley, 93 Ky. 582, 20 S. W. 781 (1892); Corby v. Drew, 55 N. J. Eq. 387, 36 Atl. 827 (1897). If in the particular case there is no duty to speak, silence will not bar specific performance. Thus in Standard Steel Car Co. v. Stamm, 207 Pa. 419, 56 Atl. 954 (1904), the purchaser was employed to secure options for the plaintiff for land to be used for its manufacturing plant. The court enforced specific performance, reversing the lower court, holding there was no duty to disclose the purpose for which the land was being purchased, though the selection of that site would and did considerably enhance the value of the land. See, also, Turner v. Green, [1895] 2 Ch. 205; Cables v. Steel, 7 Ore. 491 (1878).

subject to rescission for false representations.[22] Rescission for misrepresentation whether with knowledge or innocently made is discussed in the following chapter.[23] It will appear in that connection that the misrepresentation must be actually relied on by the purchaser, and that it must be material. If he knew or should have known the facts, based on his examination of the property or otherwise, or if the misrepresentations are not substantial so that enforcement of the contract will give him substantially what he expected to get under the contract, the right to rescind does not exist and specific performance, with compensation when appropriate, will be enforced.

Much the same situation exists in cases of mistake set up as a bar to specific performance. Mutual mistake which is substantial gives to either party the right to reform or to rescind the contract. This branch of equitable relief will be discussed in a later chapter.[24] Rescission ends all right to enforce the contract, and if reformed it can be enforced only as reformed. In many cases of unilateral mistake, where there is no right to rescission or reformation, equity will refuse specific performance where such enforcement would be harsh and oppressive, under the reserved power of equity to withhold the usual relief when damages is the fairer remedy. Thus where the defendant bid for the wrong property at an auction sale, though due entirely to his own negligence and without excuse of any kind, the courts refused to make him take title because of the hardship involved in assuming the ownership of property he had no thought of buying, leaving the plaintiff to his action for damages.[25] In a modern English case the purchaser was held to a bid of exactly the same sort, the chief difference being that he was a real estate operator and might therefore take and develop the property actually bid in by him as readily as the property which he intended to purchase for development, the court finding that no serious hardship was involved in the specific enforcement of the

22 Thus in Higgins v. Samels, 2 J. & H. 460, 70 Eng. Rep. 1139 (1862); 2 Cook, Cas. Eq., 735, and Allen v. Kirk, 219 Pa. 574, 69 Atl. 50 (1908), 2 Cook, Cas. Eq., 740, affirmative misrepresentations were made giving the purchaser the right to rescind, and necessarily barring specific performance.

23 See § 106, *post.*

24 Chap. XXI, *post.*

25 Malins v. Freeman, 2 Keen 25, 48 Eng. Rep. 537 (1837).

contract.[26] In Tamplin v. James[27] the purchaser's mistake in thinking that the property sold at auction included gardens to the rear, based on the fact that the gardens had been occupied with the property sold for many years, was held to be no defense to specific performance, as the plans on exhibition in the sales room described exactly what was offered for sale, the court saying: "If a man will not take reasonable care to ascertain what he is buying, he must take the consequences." The mistake was held to be not of "vital importance," as he intended to purchase that particular property. Each case must turn on its own facts in determining whether enforcement will be so unjust as to relieve the purchaser from taking title, leaving him to the payment of damages which under statutory merger of law and equity in most jurisdictions will now be assessed in the same action.[28] In a New Jersey case[29] a bid by the first mortgagee on a sale on foreclosure of the second mortgage, was made on the mistaken notion that a bid covering the amount of the first mortgage and costs was necessary to protect his mortgage, resulting in a heavy loss to him if the bid should be enforced. The court refused specific performance spite of the fact that the mistake was without excuse because the result of enforcement would be unconscionable. It does not matter why the mistake gives no right to rescission or reformation, whether because it is unilateral as in the cases above referred to, or because it is a mistake of law, as in the case last cited. If the result of specific performance will be clearly unconscionable it will not be enforced, though resulting from a mistake of law.[30]

In these cases, as in cases of misrepresentation, the right to affirmative relief usually exists either by rescission or by re-

26 Van Praagh v. Everidge [1902], 2 Ch. 266, reviewing the English cases. This case was reversed on another point without discussion of this question [1903], 1 Ch. 434.

27 15 Ch. Div. 215 (1879). The last three cases are reprinted in 2 Cook, Cas. Eq., 772, 774, 776, respectively.

28 Nicholson v. Fawley, 112 Kan. 124, 210 Pac. 482 (1922); Van Praagh v. Everidge, note 26, *supra*.

29 Sullivan v. Jennings, 44 N. J. Eq. 11, 14 Atl. 104 (1888). See also Twining v. Neil, 38 N. J. Eq. 470 (1884), involving a similar inexcusable mistake by the bidder. Specific performance was denied.

30 Powell v. Smith, L. R. 14 Eq. 85 (1872); Patterson v. Bloomer, 35 Conn. 57 (1868). See 3 Williston, Contracts, §§ 1427, 1581, *et seq.*

formation, as where the other party has notice of the mistake and takes advantage of it. Questions of this sort are treated hereafter. It must be remembered that mistake in all such cases constitutes a valid defense to specific performance of the contract as it stands. The cases discussed in this section are limited to situations in which the mistake gives no right to affirmative relief, but in which it will be a defense to specific performance when combined with other circumstances so that a situation of hardship arises sufficiently serious to bring into action the discretionary power of equity to withhold the usual relief because "reason and conscience" demand it.

§ 104. **Hardship.** The cases of misrepresentation and mistake discussed above are often inseparably associated with elements of hardship, and in most of them, particularly in cases of unilateral mistake and mistake of law, relief is given only when enforcement of the contract will operate harshly and oppressively. But some contracts may be so grossly unfair that equity will refuse specific performance, leaving the plaintiff to his legal remedy, though no fraud or mistake exists. Lord Hardwick refused to enforce as unconscionable a contract by an expectant heir to pay £10,000 out of his ancestor's estate in case he survived his ancestor, in consideration of an advance of £5,000.[31] In Miss. & Mo. R. Co. v. Cromwell,[32] Judge Bradley said: "He comes into court with a very bad grace when he asks to use its extraordinary power to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law." In Marks v. Gates,[33] an agreement in consideration of $1,000 in cash and the release of a debt of $11,225, to transfer to the plaintiff a 20% interest in all property which the defendant should thereafter acquire in Alaska, enforcement of which would

[31] Earl of Chesterfield v. Jansen, 2 Ves. 125, 28 Eng. Rep. 82 (1750).

[32] 91 U. S. 643 (1875).

[33] 154 Fed. 481 (C. C. App. 1907). See, also, Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903 (1903); Bates Match Co. v. Bates, 87 Ill. App. 225 (1899); Godwin v. Springer, 233 Ill. 229, 84 N. E. 234 (1908); Bartley v. Lindabury, 89 N. J. Eq. 8, 104 Atl. 333 (1918), and cases cited under § 103, *ante*.

mean the transfer to the plaintiff of property worth $150,000, was refused specific performance as unconscionable. The improvident nature of such a contract by which the defendant surrenders a substantial part of his future acquisitions, rather than the mere inadequacy of the consideration, seems to be the reason which moves the court in such cases.

Inadequacy of consideration alone is not generally regarded as sufficient reason for denying specific performance, the parties having dealt on an equal basis with an understanding of what they were doing, and no element of unfairness or trickery of any kind being involved.[34] In practically all of the cases other facts exist, which, in combination with serious inadequacy of con-

[34] In Harrison v. Town, 17 Mo. 237 (1852), the court makes a clear statement of the principle involved: "Inadequacy of price, when connected with circumstances of unfairness, overreaching or oppression, may and ought to be an objection to executing the contract; but when the parties stand upon equal grounds, with equal means of information, and not in any confidential relation, and without any artifice practiced, it is difficult to discover any good reason for refusing the execution of a contract, because the consideration is inadequate. The language is often employed by judges, that the inadequacy of consideration may be so great as to be conclusive evidence of fraud. . . . The only way to test the correctness of the rule is to attempt its application in a case where the parties are confessedly equal in their capacity, means of information, and in all other circumstances, and where no relation of confidence existed. In such case, gross inadequacy of consideration would as well prove the motive of the party who was to make the conveyance, to be some feeling of generosity to the other party, as it would prove fraud in the party who was to receive the conveyance." This statement fairly represents the position generally taken by the modern cases. See long list of cases, 36 Cyc. 609, to this effect. It must be remembered that no absolute rule can be laid down, as equity does not exclude the possibility of refusing specific performance for mere inadequacy of consideration if such performance will operate with extreme harshness and injustice. Thus in Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072 (1908), the court refused specific performance of an exchange of farms, one of which was concededly worth $25,000 and the other practically nothing over incumbrances. The court said: "Waiving, for the moment, all questions of fraud and misrepresentation, we are compelled to say that this contract is so one-sided that a court of equity cannot lend its aid to its enforcement." For a review of the earlier cases, see Seymour v. Delancey, 6 Johns. Ch. 222 (N. Y. 1822), Chancellor Kent's holding that inadequacy of consideration was a defense being overruled on appeal, 3 Cow. 445 (1824).

sideration, leave no doubt as to equity's action, and the question of the effect of inadequacy of consideration alone is largely academic, usually raised, as in some of the cases above cited, by arbitrarily excluding the attendant facts for the purposes of argument. There can be no doubt that equity has not shut out the power to withhold relief solely on the ground of gross inadequacy of consideration. It is still a matter of equitable discretion. Mental weakness, intoxication, ignorance of business or other circumstance establishing a marked difference in the position and ability of the parties, when combined with inadequacy of consideration, will generally cause equity to refuse specific performance.[35]

The courts have refused specific performance in many cases in which changes occurring after the contract was made but before the time for performance, which could not fairly be regarded as contemplated or expected by the parties when the contract was made, and for which neither of the parties are responsible, make performance of the contract a hardship to one and an unfair advantage to the other. In the leading case on this point[36] the Supreme Court of the United States decided that the vendor could enforce specific performance against a purchaser on the exercise of an option made in 1854, to be exercised during the ten year term of a lease of which it was a part, and exercised just before the expiration of the term in 1864, but only on payment of the purchase price in coin or its equivalent, not in the new legal tender notes issued during the civil war which were worth only about half the value of gold and silver coin of equal amount, which was the basis of the currency at the time the option was given. "Such a substitution of notes for coin could not have been in the possible expectation of the parties. . . . The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity."

In a New York case[37] it appeared that between the date of the contract and the date for transferring title substantial as-

[35] Knott v. Giles, 27 App. D. C. 581 (1906); Moetzel v. Koch, 122 Iowa 196, 97 N. W. 1079 (1904); Kelley v. York Cliffs Imp. Co., 94 Me. 374, 47 Atl. 898 (1900); Branagan v. Malaney, note 20, *supra;* Miller v. Tjexhus, 20 S. Dak. 12, 104 N. W. 519 (1905).

[36] Willard v. Taylor, 8 Wall. 557 (1869).

[37] Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286 (1893).

sessment had been levied upon the property for street improvements to be made later which would greatly enhance the value of the property. Under the contract these assessments had to be paid by the vendor in order to give a clear title to the property. The Court of Appeals said: "Where by reason of circumstances which have intervened between the making of the contract and the bringing of the action (by the vendee for specific performance), the enforcement of the equitable remedy would be inequitable and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches, or inattention by the party resisting performance in not foreseeing and providing for contingencies which have subsequently arisen, the court may well refuse to specifically enforce the contract and will leave the party to his legal remedy."[38] The adopting of a zoning ordinance after the contract was made but before transfer of title, which bars the purchaser from using the property for the purposes intended by him, has been treated as a hardship which is a bar to specific performance against him, though he remains liable at law for damages.[39] The unfairness of requiring specific performance and the assumption of responsibilities of ownership by the purchaser is clear when the contract was made with the understanding on both sides that the property was available for the purchaser's business, it being certain that no contract would have been made if the zoning ordinance had been foreseen or expected. At law the contract is valid as the title is clear, and the zoning ordinance is not an incumbrance or basis for valid

[38] See Nelson v. Robinson, 189 Iowa 1076, 178 N. W. 416 (1920), 2 Cook, Cas. Eq., 811, the court decreeing specific performance, the purchaser taking subject to the assessments so far as they had not been paid by the vendor at the time for performance. See, also, Mentlikowski v. Wisniewski, 173 Mich. 642, 139 N. W. 874 (1913).

[39] Anderson v. Steinway & Sons, 178 App. Div. 507, 165 N. Y. Supp. 608 (1917), affirmed 221 N. Y. 639, 117 N. E. 575 (1917). In Biggs v. Steinway & Sons, 229 N. Y. 320, 128 N. E. 211 (1920), specific performance was granted though the defendants could not use the land because another parcel to be used with it for defendant's building came under a similar ordinance prior to date for closing. The court said there must be some limit upon the exercise of this discretionary power; that it should not be exercised except where the change directly affected the land involved in the contract, not another parcel, as in this case.

objection to the vendor's title. It may be argued that the purchaser as equitable owner takes subject to risks of unforeseen events of this kind as in the cases of destruction by fire or other casualty.[40] So far as any financial loss is involved he does take the risk, as he must pay as damages the difference between the contract price and the fair value of the property at the time for closing under the contract. Equity does not enforce against him the duty of taking title to property which he cannot use, and the burden of carrying and selling it, in the exercise of the discretionary power to withhold specific relief when in the particular case damages seem to be the fairer and therefore the better remedy, exactly as in the many other cases in which that power is exercised, as detailed in this and an earlier chapter.[41] The doctrine of risk of loss is not involved. Here as in the other cases, particularly under code merger of law and equity, the question is, Which is the better form of relief, damages or specific relief? Under code merger it is the duty of the court to award damages instead of specific performance in such cases, finally settling the controversy without another action. Indeed the plaintiff, failing to secure specific performance, should not be allowed to sue again for damages, as he has had his day in court, his action being to enforce the contract, and he should ask for and secure damages as alternative to specific performance, exactly as in an ejectment suit to remove an encroaching building the plaintiff is barred from alternative equitable relief which he failed to seek in the ejectment suit if the judgment in ejectment cannot be enforced.[42] Code merger of law and equity means that in every case the court is a court of both law and equity to finally dispose of every question, legal and equitable, arising between the parties under the pleadings. The heavy expense to the public of litigation should not be permitted to be doubled in all these cases by allowing an entirely new action on issues directly involved in the first action.

In the actual disposition of these cases, whether in an action by the vendor for specific performance, or in an action by the purchaser to recover his deposit, the question of the relation of the actual damages to the deposit should be considered and dis-

[40] See note (1923), 23 Col. L. Rev. 660.

[41] See Ch. XI, *ante*.

[42] See § 22, notes 19–21, *ante;* Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901).

posed of at the same time. Surely it is settled that a provision for a penalty, not fairly construable as liquidated damages, will not be enforced either at law or in equity. In every such case arising under a clause in the contract fixing the alleged "penalty" or "liquidated damages," the plaintiff can recover only his actual damages.[43] It is equally well settled that where a deposit as security has been made to cover any such liability, the entire deposit is not forfeited, but the defaulting party may recover the deposit less the actual damages.[44] By weight of authority and on principle, where the amount paid by the purchaser so exceeds damages arising from his breach of the contract as to amount to a penalty, he is entitled to recover the amount of his payment less such damages when the contract is not specifically enforced either by compelling the purchaser to take title and pay the price or by a foreclosure sale of the property and the application of the proceeds to the price with a judgment against the purchaser for any deficiency.[45] In New York and some other states this situation is made doubtful by the holding, never worked out or explained adequately, that a defaulting purchaser can never recover purchase money paid by him unless the vendor has rescinded the contract.[46] In some cases, although the vendor after the purchaser's default has sold the property to another at an advanced price, so that he has sustained no damage, recovery by the first purchaser of payments on the purchase price has been denied because he is in default under the contract which the courts hold is not rescinded by the vendor's subsequent sale to another.[47] This unfair result cannot possibly be sustained. When the controversy is brought before the court by either party, whether by the vendor seeking specific performance or damages or by the purchaser seeking a return of his payments, a final disposition of the entire matter should be made giving to either party any relief, legal or equitable, to which he may be entitled. Thus if the vendor cannot have specific performance for any reason he should recover damages over and above payments on the purchase price. If those payments exceed the damages so substantially that the

43 See § 74, note 27, *ante*.

44 See § 74, note 28, *ante*.

45 See § 74, notes 28, 32, 45, and text to which they relate.

46 See N. Y. cases, § 74, note 28, *ante*.

47 See preceding notes, 43, 44, 45.

keeping of them by the vendor would amount to a penalty, then the purchaser should recover such excess over damages. In a recent case the New York Court of Appeals dismissed the purchaser's action for a return of his deposit of $2,000 and denied the vendor's counterclaim for specific performance because of hardship.[48] The vendor knew of an underground stream which had been enclosed in a large pipe in its flow through the vendor's property. The purchaser knew nothing of it, and would not have purchased the property had he known. The court held that the purchaser could not rescind because of the stream as it constituted no incumbrance or objection to the title as it was a natural stream, the pipe being removable at his pleasure, but specific performance could not be had by the vendor because of the hardship involved in compelling the purchaser to take the land which was not adaptable to his purposes because of the stream, leaving the vendor to his remedy "at law." But he was already "at law," and he should have been compelled to seek his remedy of damages in the same action, or forever be barred from any later action. The plaintiff's action to recover his payment on the purchase price should have resulted in a judgment which would finally settle the controversy. Both parties were before the court. All the facts involved had been pleaded and proved. The trial court and the two appellate courts which passed on the case were courts of both law and equity bound under the Code to settle the matter finally by giving final relief, legal or equitable. Actually all relief was denied to either party and another suit for damages "at law" was left as the final remedy, with no suggestion of relief for the purchaser in case the vendor's damages should be considerably less than the purchaser's payment on the purchase price.

In an earlier case the same court refused relief to a purchaser seeking to recover his deposit, the contract stating that it was made subject to leases expiring or containing provisions for their cancellation on the following October 1st. The emergency rent laws went into effect before the date for closing, radically changing the landlord's power to terminate the leases. The court distinguished the Steinway case as an exercise of judicial discretion in denying specific performance, holding that

[48] Kleiberg v. Ratett, 252 N. Y. 236, 169 N. E. 289 (1929).

the contract was not made invalid by the emergency rent laws, even though specific performance might not be granted because of hardship.[49] Treating the case as technically an action to rescind at law, the court held that the purchaser could not rescind, and therefore could not recover his deposit. As all the facts were before the court, which was and is a court of both law and equity bound to administer complete relief, it is difficult to understand why a further action for damages was necessary. The plaintiff's action, though failing on his theory of rescission, plainly called for equitable relief in his favor if retention of the entire deposit would operate as a penalty. In determining that question surely the court had jurisdiction to settle the question of damages in its relation to the deposit. Apparently the vendor did not seek or want specific performance. The only remaining question was that of damages for the plaintiff's breach and the disposition of the plaintiff's deposit in that connection, as in the Kleinman case. It seems unfortunate that mere technical labels applied to these actions should be permitted to prevent the granting of final relief in a single action as the Code requires, and as justice and public policy and economy so obviously demand.

We have seen that affirmative contracts by railroad companies to maintain stations and stop trains at such stations, generally in return for a right of way through the plaintiff's property, have been specifically enforced in equity because of the inadequacy of the legal remedy.[50] Where the contract restricts or hampers the company in establishing stations and supplying service at other points it will not be enforced as contrary to public policy.[51] Though there is no such restriction the court

[49] Urbis Realty Co. v. Globe Realty Co., 235 N. Y. 194, 139 N. E. 238 (1923).

[50] See § 65, n. 25, *ante, et seq.*

[51] Texas & P. R. Co. v. Marshall, 136 U. S. 393 (1890); Beasley v. Texas etc. R. Co., 191 U. S. 492 (1903); Herzog v. Atchison, T. etc. R. Co., 153 Cal. 496, 95 Pac. 898 (1908); Mobile etc. R. Co. v. People, 132 Ill. 559, 24 N. E. 643 (1890); Whalen v. Balt. etc. R. Co., 108 Md. 11, 69 Atl. 390 (1908); Swift v. Del. etc. R. Co., 66 N. J. Eq. 34, 57 Atl. 456 (1904); Conger v. N. Y. etc. R. Co., 120 N. Y. 29, 23 N. E. 983 (1890). For cases enforcing specific performance in spite of some incidental interference with public service, see Taylor v. Florida East Coast etc. R. Co., 54 Fla. 635, 45 So. 574 (1907), and other cases cited 36 Cyc. 621, n. 7.

In Herzog v. Atchison etc. R. Co.,

may in its discretion refuse to enforce such contracts specifically where such enforcement will be a heavy burden to the defendant and will do the plaintiff very little good, an illustration of equitable discretion in "balancing the equities," based on hardship.[52]

supra, the extreme position was taken, not in accord with the general rule, that the plaintiff must plead and prove affirmatively facts satisfying the court that the enforcement of the contract will not be unfair and unjust. Hardship or violation of public policy is matter of defense, and should be set up and proved by the defendant in such cases.

52 See cases in preceding note, also Clark v. Rochester L. & N. F. R. Co., 18 Barb. 350 (N. Y. 1854); Chicago San. Dist. v. Martin, 227 Ill. 260, 81 N. E. 417 (1907); Southern R. Co. v. Franklin etc. R. Co., 96 Va. 693, 32 S. E. 485 (1899).

PART IV

EQUITABLE RELIEF AGAINST FRAUD AND MISTAKE AND IN MISCELLANEOUS CASES

CHAPTER XX

FRAUD

§ 105. **Fraud and Deceit at Law.** A brief summary of the rules at law which apply to cases of legal fraud will help to make clear the special problems in fraud cases which arise in equity. The purpose of this chapter is to discuss equitable relief only as against fraud, and its relation to fraud at law, leaving to texts on torts and contracts the detailed treatment of fraud at law and the citation and discussion of the cases involving legal relief.

The normal remedy at law in cases of fraud is the action in tort for fraud and deceit, which originated and developed as a form of the action on the case for deceit. There must be a false representation of a material fact, which the defendant knew or should have known to be false, on which the plaintiff relied to his damage, having a reasonable right to rely on the representation as an average man. The misrepresentation must be of fact, not of opinion,[1] and the fact must have been material. Trivial misrepresentations give no action.[2] Scienter, or knowledge of the falsity of the representation is required, but under the modern cases if the facts are such that the defendant as a

[1] For cases illustrating the distinction between statements of fact and of opinion see § 108, *post*, discussing misrepresentation in connection with actions for equitable relief. It is a matter of whether or not the representee had a right reasonably to rely on the statement. Thus a false statement made to deceive by a lawyer or other expert to a layman on a question of law or other matter, though of opinion, in which he has special knowledge and skill, may be relied on and will constitute fraud (See 3 Williston, Contracts, 2660.), though a similar representation by one layman to another, on equal terms, would be a matter of mere opinion on which reliance could not be placed. For the history of the action of deceit at law see note 8, *post*.

[2] See 3 Williston, Contracts, § 1490.

reasonable man should have known that his statement was false, or if he made the statement positively as a fact known to him when he did not know whether his statement was true or false, this requirement is satisfied.[3] There is no doubt that the plaintiff cannot recover if the facts were apparent so that he could be misled only as a result of ignoring what any average person should have observed and understood. Nevertheless the rule laid down in some of the earlier cases that the plaintiff must have investigated with reasonable care, and if he has been negligent in relying on the defendant's false statements he cannot recover,[4] are very much modified by later cases. Whether or not the plaintiff was negligent in relying upon the truth of the defendant's representations seems to be immaterial. If under the facts, because of the relation of the parties, involving trust and confidence, or because the representor was in a position to know the facts which was definitely superior to that of the representee, or where an investigation by the representee could not be easily made, the courts hold that he was justified in relying on the truth of the false statements.[5]

§ 106. Rescission at Law and in Equity. Fraud has been a valid defense to the enforcement of a simple contract at law

[3] See § 109, *post.* In Derry v. Peck, 14 App. Cas. 337 (1889), the English rule that a misrepresentation of material fact of which the representor had knowledge was not fraud because made in good faith without actual intent to defraud is opposed to earlier English cases and to the overwhelming weight of authority in the United States. See long list of cases cited, 3 Williston, Contracts, 2683, 2684, n. 40. It is also inconsistent with the law of warranty and of estoppel *in pais,* discussed in § 109, *post.*

[4] Slaughter's Adm'r v. Gerson, 80 U. S. (13 Wall.) 379 (1871); Brown v. Leach, 107 Mass. 364 (1871); Poland v. Brownell, 131 Mass. 138 (1881); Long v. Warren, 68 N. Y. 426 (1877), and other cases cited, 3 Williston, Contracts, 2694, notes 67 and 68.

[5] See long list of cases cited and discussed, 3 Williston, Contracts, 2694, 2695, n. 69.

It is clear that no remedy can be had in equity to recover damages for fraud, as the remedy at law is adequate. Mackintosh v. Tracy, 4 Brewst. 59 (Pa. 1868); Kilgour v. Parker, 3 J. J. Marsh 577 (Ky. 1830), 3 Cook, Cas. Eq., 4–6. The relief by way of restitution in equity for fraud in the fifteenth century, like corresponding relief in simple contract cases in which no relief could be had at law, was ended by the development at law of adequate relief in the action on the case for fraud and deceit, just as such relief in contract cases was displaced by assumpsit.

by action for damages since the development of such actions in the form of assumpsit. If the defendant received anything of value through performance of the contract by the plaintiff he was required to tender it back as a condition of establishing fraud as a defense.[6] This was not true of contracts under seal because of the technical rule that nothing outside the four corners of the instrument could be proved to vitiate it, provided it had come into existence as a valid obligation, but if fraud in the execution of the instrument was established, such as fraudulent substitution of a different instrument, the defense was good because the instrument never came into existence as a valid obligation. Equity intervened to prevent the enforcement of specialties induced by fraud, because the law gave no relief. These developments, and the establishment of fraud and similar equitable defenses as defenses in law actions by modern statute in England and most of the United States, have been treated in detail in earlier chapters.[7] Apart from these cases of specialties, therefore, the right to rescind at law has existed since the development of assumpsit as an alternative to the recovery of damages in the action for fraud and deceit.[8]

[6] 3 Cook, Cas. Eq., Preliminary Note, citing American Sign Co. v. Electro-Lens Sign Co., 211 Fed. 196 (1913); Bwlch-Y-Plwm etc. Co. v. Baynes, L. R. 2 Ex. 324 (1867). See § 107, *post*, as to return of consideration received under contract as a requisite of rescission. See note 8, *post*, as to development of the action of fraud and deceit at law and rescission at law and in equity.

[7] See § 5, and Chap. IV, § 21, *ante*.

[8] The action of tort for fraud and deceit developed in the sixteenth and seventeenth centuries in the form of an action on the case. Holdsworth points out that the ancient action of deceit was very limited. 3 Hist. Eng. L. 407, 408. The primitive notion prevailed that "the thought of man is not triable" *ibid.* 374, 375. Prior to the 16th century cases of deceit were mostly cases of legal process and remedies used fraudulently. He cites several cases (5 Hist. Eng. L. 417, n. 1), Chandelor v. Lopus (1603), Cro. Jac. 4; Southern v. How (1618), Cro. Jac. 468–471; Furnis v. Leicester (1619), Cro. Jac. 474, asserting that false representations made with knowledge of the falsity is the basis of the action of fraud and deceit, in which cases we see the modern action taking form. Before the development of assumpsit in the 16th and 17th centuries, the only action in contract was covenant, and fraud could be established as a defense to a spe-

Where rescission involves the reconveyance of land or the retransfer of stock to the defrauded party, intervention by equity is necessary as the law has no remedy by which such formal retransfer of title can be accomplished.[9] In other cases

cialty only by an affirmative action in equity as explained above (note 7 and text to which it relates). It is clear, therefore, that the action at law in fraud and deceit for damages and the defense of fraud to actions of assumpsit were, roughly speaking, contemporaneous in their development; that until around the beginning of the 17th century there was no effective remedy at law for fraud except in the narrow field of the old action for deceit, and no defense of fraud in contract cases. In the 14th and 15th centuries property obtained by fraud could be recovered in equity. Ames, Lectures in Legal History, 234, citing Bief v. Dier, 1 Cal. Ch. XI (1377–1399); Brampton v. Seymour, 10 Seld. Soc. Sel. Cas. Ch. No. 2 (1386); Grymmesly v. Cobham, *ibid.*, No. 61; Flete v. Lynster, No. 119 (1417–1424); Stonehouse v. Stanshawe, 1 Cal. Ch. XXIX (1432–1443). For other illustrations of early relief in equity requiring restitution in cases of fraud see Barbour, History of Contract in Early English Equity, 4 Oxford Studies, 23, 85–88, 94–97; 5 Holdsworth, *op. cit.* 292.

The development of relief for fraud at law following the cases of the 17th century above cited involved the growth of the implied warranty of title and the implied warranty of quality in connection with sales of goods and chattels. See 3 Williston, Contracts, §§ 1503–1507, for a careful and illuminating treatment of this development. There is no doubt that the development of the action of fraud and deceit by way of single instances went on during the intervening period, but it was not until the decision of Paisley v. Freeman, 3 T. R. 51 (1789), 3 Williston, *op. cit.* 2672, that the general doctrine of liability for known false statements resulting in damage in any case became definitely established. The merger under the modern cases of rescission for fraud at law and in equity is dealt with in the text following.

9 This is true whether the rescission is by the vendor or by the purchaser. Davis v. William Rosenzweig Realty Co., 192 N. Y. 128, 84 N. E. 193 (1908); Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855 (1918); Allerton v. Allerton, 50 N. Y. 670 (1872); Garner etc. Co. v. Leverett, 32 Ala. 410 (1858); Basye v. Paola Refining Co., 79 Kan. 755, 101 Pac. 658 (1909). See cases in notes following of rescission enforced in equity. In Billings v. Mann, 156 Mass. 202, 30 N. E. 1136 (1892), Judge Holmes, after asserting his satisfaction with the Massachusetts doctrine that avoidance of a deed for fraud puts title back in the grantor as in the case of chattels (see note 10, following), [this doctrine developed in Massachusetts because of the absence of equity courts prior to the Statute of 1877, c. 178] held that since that statute concurrent relief in equity to compel a reconveyance could be had, which is essential in other states generally.

involving fraudulent sales of personal property the remedy at law is complete as a defrauded seller may recover the chattels by replevin or their value in conversion, and a defrauded buyer may recover the price which he paid,[10] eliminating any possible need of equitable rescission.[11]

In many cases equity impresses a trust upon money or property secured by fraud, and if the property so secured is sold to a purchaser for value without notice so that the specific property cannot be recovered, an action in equity will lie to compel the fraudulent party to account for the proceeds of the sale, impressed with the same trust.[12] In a suit at law the plaintiff

10 Jones v. Keene, 2 Moody & R. 348 (1841), 3 Cook, Cas. Eq., 7; Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 390 (1906); Hall v. Gilmore, 40 Me. 578 (1855); Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35 (1907); Skinner v. Mich. Hoop Co., 119 Mich. 467, 78 N. W. 547 (1899). Statements made in some cases, as in Van Cleef v. Fleet, 15 Johns. 147 (N. Y. 1818) and Carey v. Hatailing, 1 Hill. 311 (N. Y. 1841), 3 Cook, Cas. Eq., 8 n., that the fraudulent buyer gets no title, must be taken to mean that he gets no title which is good as against rescission by the vendor, as the law is definitely settled that a purchaser for value without notice from the fraudulent buyer gets an indefeasible title, which necessarily involves transfer to him of the legal title through the fraudulent purchaser. See note 16, *post*, also 3 Williston, Contracts, § 1370.

The party defrauded, on rescinding, may retake possession by self-help if he can do so peaceably, thus recovering his title. In re Eastgate (1905), 1 K. B. 465; Wheelden v. Lowell, 50 Me. 499 (1862); 3 Williston, Contracts, 2444; 3 Cook, Cas. Eq., 8–10.

11 3 Williston, Contracts, 2444, citing Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249 (1886); Walter v. Garland Auto. Co., 164 App. Div. 183, 149 N. Y. Supp. 653 (1914).

12 In Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922), the stock sold to defendant through his fraud had been transferred by him to a purchaser for value without notice. The court reversed a judgment for defendant which was on the ground that the remedy of rescission at law was adequate. Cardozo, J., said: "We think that equity will intervene to declare the wrongdoers trustees. Hammond v. Pennock, 61 N. Y. 145, 146; Newton v. Porter, 69 N. Y. 133; Lightfoot v. Davis, 198 N. Y. 261. Some remedy at law there is. It is not so complete or effective as the remedy in equity. [Kilbourn v. Sunderland, 130 U. S. 505]. Suing at law, the plaintiff would be restricted to the value of his shares, if he rescinded [Rothschild v. Mack, 115 N. Y. 1, 8.] or to the difference between the value and par [the amount paid to him by the defendants], if he affirmed [Reno v. Bull, 226 N. Y. 546]. Suing in equity, he may reach the proceeds of the resale, securities and cash,

could recover only the value of his property; in equity he compels the defendant to account for any profits which he may have secured over the value of the property so transferred.

In cases of fraud by fiduciaries and other cases of fraud in which equity implies a trust, if unjust enrichment is involved a *quasi*-contractual action lies on a promise implied by law.[13] Nevertheless equity continues to have concurrent jurisdiction, as in other cases in which the law has followed equity in giving relief, in spite of the fact that relief at law is now adequate.[14]

though the price upon resale is found to be greater than the value." See, also, Corn Exch. Nat. B. v. Solicitors' Loan & Trust Co., 188 Pa. 330, 41 Atl. 536 (1898), 3 Cook, Cas. Eq., 10, 12.

13 Thus in Cory v. Board of Freeholders etc. 47 N. J. L. 181 (1885), money secured by the defendant from the plaintiff by fraud was recovered on the common court for money had and received. The court quoted Lord Mansfield in Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Rep. 676 (1760). "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action [on the case, for money had and received to the plaintiff's use] founded in the equity of the plaintiff's case, as it were, upon a contract. . . . This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore, much encouraged. . . . It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition [express or implied], or extortion, or oppression, or an undue advantage taken of the plaintiff's situation. . . . In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

On the same principle the prevailing rule is that the plaintiff may recover in quasi contract for the reasonable value of the goods which the fraudulent buyer has converted or refuses to return, though the time fixed for payment of the price under the contract of sale has not arrived, fraud vitiating the contract, so that the defendant is at once liable for such reasonable value. Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451 (1901); Toledo etc. Ry. Co. v. Chew, 67 Ill. 378 (1873); Norden v. Jones, 33 Wis. 600 (1873). *Contra:* Jones v. Hoar, 5 Pick. 285 (Mass. 1827). See 3 Cook, Cas. Eq., 14–16, where the above cases are reported or cited; 3 Williston, Contracts, 2713, explaining that while the price cannot be recovered until due, if the contract is rescinded the tort may be waived and the reasonable value recovered.

14 Thus in the case of a lost or destroyed instrument, enforced in equity because of the absence of relief at law, the adopting at law of the rule in equity permitting secondary evidence does not deprive equity of jurisdiction which continues concurrently with the subse-

Though fraud is a defense to actions on contracts under seal under statutes making equitable defenses available in actions at law, an affirmative action in equity may be maintained to have the bond or negotiable instrument surrendered for cancellation if there is danger that the defense may be lost by transfer to a purchaser for value without notice, or that evidence of the defense may be lost before the holder brings his action on the instrument.[15]

It is generally stated that the right to rescind for fraud developed in equity, and the adopting of it at law is simply another illustration of the growth of law through equity. The rule seems to be settled everywhere that the right to rescind for fraud, so as to recover specific real or personal property from a fraudulent vendee, is lost by a transfer of the legal title to a purchaser for value without notice.[16] As that doctrine does not apply to purely legal rights, except under factor's acts, recording acts and similar statutes, these cases are nearly, if not quite, conclusive. Yet the defense of fraud at law in simple contract cases, involving the return by the defendant of anything of value which he may have received through part performance by the other party, is rescission in every respect. If tangible personal property is involved the person rescinding recovers his property or its value on rescinding, the title of the fraudulent party being ended by the seller's election to rescind, so that the defense of fraud involves the affirmative right to end

quently developed remedy at law. Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040 (1891), quoting Lord Thurlow in Atkinson v. Leonard, 3 Brown, Ch. 218, 224, 29 Eng. Rep. 499 (1791): "It does not follow because the court of law will give relief that this court loses the concurrent jurisdiction which it always had." That this is the prevailing view see 21 Corpus Juris, 47. In Maine, Massachusetts and Pennsylvania no courts of equity existed until after many years general equitable jurisdiction was created in their courts by statute. See Billings v. Mann, 156 Mass. 203, discussed in note 9, *supra*, also Titcolm v. McAllister, 77 Me. 353 (1885), 1 Cook, Cas. Eq., 430, 435 n.

[15] See § 116, *post*, on bills *quia timet*.

[16] Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922); Puddon v. Taylor, 44 N. Y. 371 (1871); Dettra v. Kestner, 147 Pa. 566, 23 Atl. 889 (1892). See many cases cited 3 Williston, Contracts, 2723, 2724, notes 74, 75, 76. As to the earlier development of relief in equity for fraud, and the later development of relief at law see note 8, *supra*. See note (f), p. 100 *ante*, that duress, always a defense at law, is cut off by transfer of title to innocent purchaser for value.

the buyer's title and to recover the property from him. Equitable action in the cases of land and shares of stock is necessary because of the absence of a remedy at law to put back the formal record title by compelling a formal written reconveyance or retransfer. As all of this seems to have been true at law so far as fraud was available as a defense, it may fairly be claimed that the right of rescission developed both at law and in equity, the earlier and more usual cases of rescission by affirmative action having developed in equity in connection with which the doctrine of purchaser for value without notice was applied, that doctrine being tacitly adopted at law as a part of legal rescission without conscious reasoning. Today, rescission at law and in equity being completely merged, the question is purely academic, as the one important reason for distinguishing between legal and equitable rules when merged in the law is to determine the application of the doctrine of purchaser for value without notice, which admittedly applies to all cases of rescission where it may be material, both at law and in equity.

§ 107. Restoration of Consideration and Delay in Election to Rescind. The effect of the merger of the rules governing rescission at law and in equity is clearly illustrated by the development of the law requiring the return of what the defrauded party received under the contract as a condition precedent to rescission. At law the election to rescind for fraud, expressed and communicated in some definite way to the other party, was ineffective unless accompanied by the offer to return anything of value received from such other party, title to the plaintiff's property revesting in him only when such tender was made.[17] In equity this was unnecessary as the decree for rescission required such restoration so that both parties might be put in *statu quo*.[18] Furthermore, the defense of fraud at law was

[17] Dawes v. Harness, L. R. 10 C. P. 166 (1875); Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004 (1891); Wilbur v. Flood, 16 Mich. 40 (1867); Pearsall v. Chapin, 44 Pa. 9 (1862); Rumsey v. Shaw, 212 Pa. 576, 61 Atl. 1109 (1905); Byard v. Holmes, 33 N. J. L. 119 (1868); Friend Bros. v. Hulbert, 98 Wis. 183, 73 N. W. 784 (1898).

[18] Garner N. & Co. v. Leverett, 32 Ala. 410 (1858); Thomas v. Beals, *supra* note 17; Allerton v. Allerton, 50 N. Y. 670 (1872); Gould v. Cayuga etc. Bank, 86 N. Y. 75 (1881); Harris v. Equit. Life

ineffective in cases where there was nothing to return unless a rescission or disaffirmance of the contract was established. Without rescission fraud could be set up only by way of offset or recoupment against the plaintiff's action on the contract.[19] With rescission at law and in equity differing only in the greater power in equity by the flexibility of equitable decrees to fully restore the parties to *statu quo,* and with all difference in that respect eliminated by merger under the Code in the different code states, the court being always a court of equity as well as a court of law, with full power and in duty bound to give full relief, legal and equitable, on the facts as established under the pleadings, it is difficult to understand why any difference in respect to restoration of consideration by the party rescinding as between law and equity should even be referred to by the courts in those states. In New York and the code states generally all difference seems to have disappeared under the modern cases.[20] Of course, if the person seeking to rescind has made restoration of the *status quo* impossible by disposing of the goods or by negotiating to a purchaser for value without notice a negotiable instrument which should be returned, and is unable to get back such chattels or instrument in order to return them, rescission is impossible both at law and in equity.[21] Even in non-code states much the same situation has been reached when-

Assur. Soc., 64 N. Y. 196 (1876), [offer to allow other party to take judgment for amount received equivalent to offer to restore]; McNaught v. Equit. Life Assur. Soc., 136 App. Div. 774, 121 N. Y. Supp. 447 (1910).

19 The general allegation of fraud, to be proved, requires proof of the fraud and also proof of disaffirmance because of the fraud. Dawes v. Harness, *supra* note 17. If fraud is set up by way of offset or recoupment the contract is not rescinded, and therefore no offer to restore is needed. Harrington v. Stratton, 22 Pick. 510 (Mass. 1839); Baughman v. Gould, 45 Mich. 481, 8 N. W. 73 (1881); 3 Cook, Cas. Eq., 100 n.

20 See Allerton v. Allerton, Gould v. Cayuga etc. Bank, Harris v. Equit. Life Assur. Soc., McNaught v. Equit. Life Assur. Soc., *supra* note 18.

21 See cases cited, *supra* notes 17, 18, 20. In Davis v. Gifford, 182 App. Div. 99, 169 N. Y. Supp. 492 (1918), after tendering back the stock the defrauded purchaser kept the benefits attaching to ownership of the stock, and acted as director and member of the executive committee for ten months after discovering the fraud. The court therefore held his counterclaim to rescind for fraud failed.

ever the law court can, by conditional judgment or otherwise, assure a return to the fraudulent party so as to put him in *statu quo* as part of the judgment for rescission. The essential requisite is that both parties, the fraudulent party as well as the party defrauded, be substantially restored to their original position, and if that be accomplished technical failure to tender or make return of consideration does not prevent rescission under the modern cases. Thus a non-negotiable instrument, or a negotiable instrument not negotiated but surrendered at the trial, need not be tendered at the time of rescission.[22] Reasonable use of the property, though it be reduced in value, or other failure to restore the property as received from the fraudulent party where equitably he should be required to take it back, does not prevent rescission.[23] Retention of the consideration by the defrauded party as security for damage done to his chattels by the fraudulent purchaser is another situation in which the tender or return of the consideration is not required.[24] In the case of a fraudulent sale of real property, growing trees, or

22 Thurston v. Blanchard, 22 Pick. 18 (Mass. 1839); Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010 (1892); Skinner v. Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547 (1899); Schofield v. Shiffer, 156 Pa. 59, 27 Atl. 69 (1893). The note or check of a third person, however, should be tendered back at the time of rescission. Northampton Nat. B. v. Smith, 169 Mass. 281, 47 N. E. 1009 (1897), 3 Williston, Contracts, 2720.

23 Armstrong v. Jackson, [1917] 2 K. B. 822; Allen v. Talbot, 170 Mich. 664, 137 N. W. 97 (1912); Clark v. Wells, 127 Minn. 353, 149 N. W. 547 (1914). See quotations from Bassett v. Brown, 105 Mass. 551 (1870) and Sloane v. Shiffer, 156 Pa. 59, 64, 27 Atl. 67 (1893), in 3 Williston, Contracts, 2720, 2721, showing how the later cases have adopted the equitable principle expressed in the text, though opposed to earlier cases to which the courts refer. If substantial justice is done rescission will be enforced, in spite of technical failure in restoration of consideration. Payne v. Hiram Lindsey Co., 71 Wash. 293, 128 Pac. 678 (1912).

24 Sisson, Potter, etc. v. Hill, 18 R. I. 212, 26 Atl. 196 (1893), the court saying: "All that the defendant is entitled to is protection, and the court can afford him that by requiring the plaintiff to pay into the court for the benefit of the defendant whatever sum, if any, the plaintiff has received in excess of the value of the goods disposed of by the defendant prior to the service of the writ of replevin, either before rendering judgment, or by staying execution, until a compliance with its order for such payment." To same effect, Phenix Iron Works Co. v. McEvony, 47 Neb. 228, 66 N. W. 290 (1896).

the like, use and occupation of the land, oil taken from the land, trees cut and sold, may be compensated for in the final judgment without restoration in specie. "The law does not require impossibilities to be performed. The only thing he can do is to restore its money equivalent, and that he offers to do. In cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, and when its value is capable of being ascertained, a party entitled to may rescind a contract, although he cannot place the other party in *statu quo.*"[25]

A return of the consideration is not required as a condition to the recovery of the property fraudulently acquired which has been transferred to a third person, as nothing was received from him, and the return of the consideration to the fraudulent purchaser does not concern him.[26]

The merger of rescission at law and in equity is also clearly demonstrated by the cases determining when delay in electing to rescind will bar the right. This question is determined strictly in accord with the equitable doctrine of laches heretofore discussed in connection with specific performance of contracts.[27] It is clear that the action of tort for fraud and deceit is barred only by the statute of limitations, and talk of "waiver" of fraud as a defense to that action has no foundation where an election to rescind has not taken place.[28] It seems equally true that in an executory contract where the party disaffirming for fraud has received nothing, he is required to do nothing in the usual case until sued, when he may rescind by setting up the defense of fraud.[29] In other cases failure to elect as between rescission

[25] From opinion in Wright v. Dickinson, 67 Mich. 580, 35 N. W. 164 (1887), involving a sale of growing trees part of which the defrauded party had cut, quoted in Basye v. Paola Refining Co., 79 Kan. 755, 101 Pac. 658 (1909), in which case the defrauded party had taken oil under an oil lease which the court rescinded for fraud by the vendor of the lease, requiring compensation for the oil taken in lieu of specific restoration. A similar allowance for the use and occupation of land is illustrated in Allen v. Talbot, *supra* note 23.

[26] Stevens v. Austin, 1 Metc. 557 (Mass. 1840), 3 Cook, Cas. Eq., 112; 3 Williston, Contracts, 2722, citing additional cases.

[27] See § 102, *ante.*

[28] See discussion of this matter 3 Williston, Contracts, 2712, 2714.

[29] Roberts v. James, 83 N. J. L. 492, 85 Atl. 244 (1912).

and affirmance of the contract by holding the other party in tort will bar the right to rescind only where such delay has misled the other party to such a change of position that rescission would be inequitable.[30]

The defrauded party, if he elects to affirm the contract, may enforce it as made, and also recover damages sustained by him on that basis because of the fraud. Both remedies are consistent with each other as they are in affirmance of the contract.[31] The prevailing view by weight of authority and principle is that when he so elects to enforce the contract he cannot afterwards rescind because rescission is necessarily inconsistent with the recovery of damages for the fraud in tort, which is based on the affirmation and enforcement of the contract, making the defendant liable for what the plaintiff would have received by its performance if the false statements had been true over and above what he actually received in the performance of the contract.[32] But where the plaintiff's disaffirmance is solely for the

30 In Roberts v. James, *supra* note 29, the court said: "It is also settled that one who desires to rescind a contract must act within a reasonable time. . . . What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that, unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open so long as he does nothing to affirm the contract. Clough v. London & N. W. Ry., [1871] L. R. 7 Ex. 26; Morrison v. Universal Marine Ins. Co., [1873] L. R. 8 Ex. 197, 205; United Shoe Mach. Co. of Canada v. Brunet, [1909] A. C. 330. He may even wait until action is brought against him [Clough v. London & N. W. Ry. *ubi supra*], and a plea setting up the fraud amounts to a rescission of the contract." [Citing cases.] To same effect, Brown v. Young, 62 Ind. App. 364, 110 N. E. 562 (1915); quoted, 3 Williston, Contracts, 2715. In Basye v. Paola Refining Co., *supra* note 25, on this point the court said: "The mere question of how much time was permitted to elapse is not necessarily determinative. The important consideration is whether the period was long enough to result in prejudice to the other party."

31 Bacon & Co. v. Moody, 117 Ga. 207, 43 S. E. 482 (1903); Standard Sewing Mach. Co. v. Owings, 140 N. C. 503, 53 S. E. 345 (1906). [Uncollected judgments or notes given for machines under contract of sale did not bar action for fraud in inducing said contract.] 3 Cook, Cas. Eq. 146, 149.

32 Bacon & Co. v. Moody, *supra* note 31; Clough v. L. & N. W. R. Co., L. R. 7 Exch. 26 (1871); Strong v. Strong, 102 N. Y. 69, 5 N. E. 799 (1886), and cases cited therein. In Stuart v. Hayden, 72 Fed. 402 (1895), the court refer-

purpose of avoiding further performance after discovering the fraud, asking for no return of what he may have parted with, but seeking to recover the damages caused by the fraud up to the time of disaffirmance in the tort action, there is considerable authority and justice in permitting that solution.[33] It is unfair that he should be required to make further payments or commitments in performance of the contract in order to hold the fraudulent party for his tort. It is true he may rescind, but rescission may fall far short of giving him what the contract entitles him to. Why should he not have the right to enforce the contract as of the time when he discovers the fraud similar to the right of a plaintiff against a defendant who has defaulted in performing the contract, relieved of the duty of further performance, but with the right to full damages? He recovers his advances, not by way of restitution in rescission but as part of his damages, just as the plaintiff does in an action for breach of the contract against the defaulting defendant. Repudiating the contract for fraud when partly executed, there seems no good reason for denying that he still has the option to recapture what he has parted with by rescission or in the alternative

ring to this question, said: "The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time." See Bower, Actionable Misrepresentation, Sec. 255.

[33] In Moran v. Tucker, 40 R. I. 485, 101 Atl. 327 (1917), plaintiff had paid defendant $1000 and his note for $400 when he discovered defendant's fraud and demanded back his note and $1000. Later he sued him for damages in deceit. After stating the general rule as to election, the court said: "In many cases where the contract is only partially executed it would be unjust to hold, because of the theory on which the action of deceit is said to be based, that the party defrauded shall lose the advantage which in our practice attaches to a tort action, unless he makes further venture in the transaction into which he has been induced by fraud to enter. . . . By fraud, the defendant has obtained $1000 of the money of the plaintiff. . . . In these circumstances the plaintiff should not be required to pay $400 more to the defendant before the plaintiff shall be permitted to sue in deceit to recover the damages which he has already suffered from the fraud." The court quoted from Warren v. Cole, 15 Mich. 265, in a similar situation: "This being the character of the suit, it cannot be seriously contended that a person repudiating a contract for fraud cannot sue for redress, if he has suffered damage from it."

by suing for full damages, including the value of what he has parted with, in the action of tort for deceit.[34]

Though election to affirm the contract whether by accepting benefits thereunder, getting security for its performance, bringing an action to enforce it, or to recover damages in fraud and deceit ends the alternative right to rescind, there is strong authority and sound reason for the rule that a notice of rescission or even the starting of an action to rescind is not final: the rescission may be withdrawn and an action in fraud and deceit for damages may be brought instead if the rescission has not

[34] In Davis v. Gifford, 182 App. Div. 99 (1918), *supra* note 21, this position seems to have been involved in the court's disposition of the case. The defendant, sued on the contract, set up fraud as a defense, asking also for rescission by way of counterclaim, which was denied because defendant made his offer to rescind ineffective by taking the benefits of the contract for ten months thereafter and by making many efforts to sell the stock. After giving notice of rescission, if not accepted, he "may bring his action in equity for a rescission, when the tender may be made by an offer in the complaint, which offer must be kept good at the trial, and the court will adjust its relief as equity requires upon the facts established. Or he may affirm the contract and sue for his damages, the measure of which would be the difference between the value of the subject-matter of the contract as represented and its actual value. If sued upon the contract he may counterclaim his damages." The court refused to pass on the defendant's claim to damages in fraud and deceit, because not pleaded, but the defendant's right to have set up such counterclaim instead of the counterclaim for rescission, had he done so originally, or by amending his answer in time, was definitely recognized, though he had repudiated the contract by demanding rescission on discovering the fraud.

If he definitely rescinds as an executed matter by action, as by litigating the matter on that basis, as in the above case, or by recovering part of his goods parted with because of the other's fraud, he cannot thereafter recover the value of the goods which he is unable to reach as damages in the action of fraud and deceit. His remedy is conversion, or implied assumpsit for their reasonable value on waiving the tort. Farwell v. Myers, 64 Mich. 234, 31 N. W. 128 (1887); Powers v. Benedict, 88 N. Y. 605 (1882). Decisions holding that he may recover their value in an action for fraud such as Lenox v. Fuller, 39 Mich. 268 (1878); Am. Pure Food Co. v. Elliott, 157 N. C. 393, 66 S. E. 451 (1909), lose sight of the fact that recovering part of the goods necessarily involves rescission which eliminates enforcement of the contract. See Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22 (1892); Am. Woolen Co. v. Samuelsohn, 226 N. Y. 61, 123 N. E. 154 (1919).

been executed by retaking goods or chattels or by trial of the action to rescind.[35] While purely executory, the notice or action

[35] In Cahoon v. Fisher, 146 Ind. 583, 45 N. E. 787 (1897), the court so held, saying: "No one will deny the right to abandon a suit for rescission. Its abandonment involves the affirmation of the contract. Then, if the plaintiff may abandon it, and thereby affirm the contract, this is all he does when he sues for damages caused by the fraud in the procurement of the contract. Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355, and cases there cited, namely, Lenox v. Fuller, 39 Mich. 268; Warren v. Cole, 15 Mich. 264; Kraus v. Thompson, 30 Minn. 64; Newnham v. Stevenson, 10 C. B. 713. See, also, note to Fowler v. Bank (N. Y. App.), 10 Am. St. Rep. 487–494, 21 N. E. 172." See discussion of this case in (1923) 36 Harv. L. Rev. 712. See, also, Darris v. Gifford, *supra* note 34. *Contra*, 3 Williston, Contracts, 2717, 2718.

In U. S. v. Oregon Lumber Co., 260 U. S. 290, 43 Sup. Ct. 100 (1922), the court held that an action to rescind brought by the plaintiff to final judgment which was adverse to the plaintiff because of the Statute of Limitations, was a final election which barred the present action brought to recover damages for fraud and deceit, distinguishing Friedericksen v. Renard, 247 U. S. 207, 38 Sup. Ct. 450, where the plaintiff's action to rescind failed because he had made rescission impossible by cutting and disposing of timber; he had ratified the contract and had made it impossible to put the defendant in *statu quo*, and the case was transferred to the law side as an action to recover damages for the fraud. The Supreme Court held on appeal that the doctrine of election of remedies did not apply in that case. In the present case that case was distinguished because in the present case there was no transfer of the case to the law side of the court, but the action was prosecuted to final judgment. In a strong dissenting opinion by Justice Brandeis, concurred in by the Chief Justice and Justice Holmes, it was urged that in the action in equity all that was decided was that when the suit was brought more than six years had elapsed after the discovery of the fraud, so that the action to annul was barred by the Statute of Limitations; that the right to rescind did not exist when that action was brought, and the attempt to enforce that nonexistent right did not affect the substantive right of the plaintiff to recover damages for fraud. See note on this case in 7 Minn. L. Rev. 244. See reprint of this case, with notes, 3 Cook, Cas. Eq., 154–165.

In Davis v. William Rosenzweig R. Co., 192 N. Y. 128, 84 N. E. 943 (1908), the court held that the effect of rescission enforced in the action for fraud was to destroy the contract and therefore to destroy the purchaser's lien for purchase money paid under the rescinded contract. As explained heretofore, § 92, n. 38, *et seq.*, the purchaser is given a lien on the land for advances on the purchase money prior to the closing of title on purely equitable principles. When he elects to recover such payments because of the vendor's breach of

of rescission is in the nature of an offer which may be withdrawn before acceptance, provided the rescission has not been executed in whole or in part.

§ 108. What Constitutes Fraudulent Misrepresentation. This topic belongs primarily to the law of torts, but as rescission of contracts for fraud is an equitable remedy which seems to have developed concurrently with rescission at law, a brief review of the constituent elements of fraud at law and in equity is in order. This is especially important in order to arrive at an intelligent understanding of the situation resulting from code merger of law and equity and simplified modern pleading under the Code.

The only difference between law and equity in the requisites of fraud arises in cases of innocent misrepresentations, discussed hereafter. In other respects the same rules apply. The nature of the representation must be considered in connection with the right of the party misled to rely on the false statement. Mere statements of opinion, puffing statements of the value or quality of the vendor's goods, statements of law, and the like, do not amount to fraud in the usual case because the party to whom they are made has no right to rely on them as a man of average prudence.[36] If on the special facts he was reasonably justified in relying on them to his damage so that he was actually defrauded by the false statements, he will have the usual remedies for fraud, at law or in equity as the case may be. Thus false statements of value or of quality involving facts known to the seller on which the buyer had the right to rely are really mis-

contract this lien may be enforced, but when he elects to recover similar payments because of the vendor's fraud the lien is gone. As the lien is impressed on the land by equity because justice seems to require it, it is not apparent why it shouldn't be enforced in the one case as in the other. In both cases the lien attached as a result of the contract. In each case the contract is repudiated, in one for the defendant's breach and in the other for his fraud.

[36] Gordon v. Butler, 105 U. S. 553 (1881); Evans v. Gerry, 174 Ill. 595, 51 N. E. 615 (1898); Lynch v. Murphy, 171 Mass. 307, 50 N. E. 623 (1898); Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113 (1887); Moody v. Baxter, 167 Mo. App. 521, 152 S. W. 117 (1912); Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467 (1913); Bigler v. Flickinger, 55 Pa. St. 279 (1867). See list of cases cited 3 Williston, Contracts, 2652.

representations of fact, and constitute fraud.[37] Where the false statement of value or the like is made by one speaking as an expert, though an opinion, is fraud because the other party acted reasonably in relying on it.[38] For the same reason false statements of law by a lawyer to a layman, made with the purpose of deceiving, will be fraud when the other party relied thereon to his damage,[39] though in the usual case misrepresentations of law can be regarded only as statements of opinion on which reliance cannot be placed.

False statements of what will happen in the future, whether promises or not, are not statements of fact on which the representee is justified in relying.[40] But where goods are secured with the fraudulent intent of not paying for them, or the promise involves a false statement of fact, actionable fraud exists both at law and in equity.[41]

[37] Jackson v. Collins, 39 Mich. 557 (1878); s. c. Collins v. Jackson, 54 Mich. 186, 19 N. W. 947 (1884), [that goods in a stock are new and salable]; Van Slochem v. Villard, *supra* note 36; Edelman v. Latshaw, 180 Pa. St. 419, 36 Atl. 926 (1897). False statements of fact indicating value, are obvious cases of false statements of fact. Pilmore v. Hood, 5 Bing. N. C. 97 (1838); Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779 (1893). See many cases cited, 3 Williston, Contracts, 2653–2657.

"But if the facts are not equally known to both sides; then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact for he impliedly states that he knows facts which justify his opinion." Bowen, L. J., in Smith v. Land etc. Corp., 28 Ch. Div. 7 (1882).

[38] See cases cited, 3 Williston, Contracts, 2654, n. 24, 2658, n. 46.

[39] Stephens v. Collison, 249 Ill. 225, 94 N. E. 664 (1911); Motherway v. Wall, 168 Mass. 333, 47 N. E. 135 (1897); Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958 (1894). As to mistakes of law see § 115, *post*.

[40] See 3 Williston, Contracts, § 1496.

[41] In Kettlewell v. Refuge Ins. Co., [1908] 1 K. B. 545, the false representation by an insurance agent that payment of premiums for five years would give the insured a paid up policy was a fraudulent statement as to the course of the company's business, not a mere promise to do something in the future. The express or implied promise to pay for goods accompanied by the fraudulent purpose not to pay involves fraudulent misrepresentation of present intent to pay. Earl of Bristol v. Wilsmore, 1 Barn. & C. 514, 107 Eng. Rep. 190 (1823); Donaldson v. Farwell, 93 U. S. 631 (1876); Morrill v. Blackman, 42 Conn. 324 (1875); Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117 (1896); Hotchkin v. Third Nat. Bank, 127 N. Y. 329,

Silence or failure to disclose material facts will amount to fraud if there is a duty to disclose them. Where one party knows that the other is acting under a material mistake, and takes advantage of it without disclosing the truth of the matter, his silence may amount to fraud.[42] It is for this reason that rescission or reformation may be had in equity for unilateral mistake of which the other party had notice.[43] The principle of *caveat emptor*, established under the older cases at law, gives the vendor or other party to any contract freedom to consciously take advantage of the mistakes of the other party.[44] There is, however, a strong tendency in the later cases to extend the field in which honesty and fair dealing are held to demand that material facts about which the other party is mistaken or ignorant shall be disclosed, particularly in equity. The merger of law and equity in England and the thirty code states and territories,[45] and the practical merger nearly everywhere of legal and equitable rescission [46] have undoubtedly had a great deal to do in bringing about this change. Failure by a seller to disclose

344, 27 N. E. 1050 (1891); Slagle v. Goodnow, 45 Minn. 531 (1891); Syracuse Knitting Co. v. Blanchard, 69 N. H. 447, 43 Atl. 637 (1899). Concealment of insolvency alone is not fraud unless it be accompanied by other facts establishing a fraudulent purpose not to pay at the time the goods are purchased. Nichols v. Pinner, 18 N. Y. 295 (1858), and cases above cited. Nevertheless continuing to do business while hopelessly insolvent usually involves intent not to pay. In Anonymous, 67 N. Y. 598 (1876) the rule generally established that accepting deposits by a bank knowing of its hopeless insolvency is fraud giving the right to rescind, was applied. The court said, referring to the taking advantage of credit by a trader knowing of his hopeless insolvency: "In such a case he does an act the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred." But mere insolvency where there is a reasonable basis for believing that solvency may be regained does not make continuance of business by a bank fraudulent. See Steele v. Commr. of Banks, 240 Mass. 394, 134 N. E. 401 (1922), 3 Cook, Cas. Eq., 40 n. See 3 Williston, Contracts, § 1521.

42 Hill v. Gray, 1 Starkie 434, 171 Eng. Rep. 521 (1816); Pilmore v. Hood, 5 Bing. N. C. 97, 132 Eng. Rep. 1032 (1838); 3 Cook, Cas. Eq., 40, 47.

43 See § 114, *post*.

44 Laidlaw v. Organ, 15 U. S. (2 Wheat.) 178 (1817). See discussion of this question, 3 Williston, Contracts, 2663, and long list of cases cited for the common law rule.

45 See Chap. IV, *ante*.

46 See § 106, *ante*.

latent defects in goods and chattels is fraud giving the right to the usual remedies because the buyer is not in an equal position to discover the defect.[47] A tenant may rescind or recover damages for a concealment by the landlord of defects making the premises dangerous or unfit for occupancy, provided they would not be apparent on casual inspection.[48] The vendor or landlord is not required to point out slight defects in his goods or property; the duty to disclose applies only to hidden or latent defects not readily discoverable by the other party, and seriously modifying the value of his property. The duty of banks and other dealers to disclose their insolvency when it is hopeless, discussed above, is based on this duty to deal fairly. Cases of duty to disclose as between fiduciaries are based on the relation of trust and confidence between the parties.[49] On the other hand the development of this law does not impose on the parties an unreasonable standard of morality in business transactions. He is not compelled, as a purchaser, to disclose his purpose in purchasing the property, though the fact of the intended use of the property would greatly increase its value if known, as where land is purchased as the location of a large manufacturing plant, or as a right of way for a railroad.[50] He is not compelled to disclose his knowledge of mineral or oil deposits on the land or other collateral facts affecting its value, though equity may refuse specific performance in such cases because of hardship. Collateral facts adding to or detracting from the value of the property need not be disclosed as between parties dealing at arms length. Broadly, the question turns on whether the concealment by silence is with the unfair purpose of cheating the other party, particularly when the property offered is not what it seems to be, and the other party is not in an equal position to ascertain the truth.[51]

[47] See cases cited, Williston, Sales, § 631; 3 Williston, Contracts, 2665.

[48] Caesar v. Karutz, 60 N. Y. 229 (1875); Steefel v. Rothschild, 179 N. Y. 273, 72 N. E. 112 (1904); Cutler v. Hamlin, 147 Mass. 471, 18 N. E. 397 (1888), and other cases cited, Walsh, Property (2nd Ed.), 288.

[49] Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958 (1894).

[50] See cases cited § 103, n. 21, *ante*.

[51] Fox v. Mackreth, 2 Bro. Ch. 400, 29 Eng. Rep. 224 (1787); Harris v. Tyson, 24 Pa. 347 (1855); Guaranty etc. Trust Co. v. Liebold, 207 Pa. 399, 56 Atl. 951 (1904); Burt v. Mason, 97 Mich. 127, 56 N.

§ 109. False Statements Innocently Made. Fraud at Law and in Equity. It goes without saying that misstatements knowingly made, amounting to fraud in other respects, give rise to the right to rescind in equity as well as to the right to recover damages at law. Under the later cases, by the great weight of authority, misrepresentations made positively as within the knowledge of the person making them are fraudulent if he did not know whether or not they were true. The falsity lies in his positive statement that they were true to his knowledge when as a matter of fact they were not.[52] The requirement of scienter is also met when under the evidence the fraudulent party is charged with notice of the facts. Legally he knows that of which he has notice. He cannot close his eyes to apparent facts and escape responsibility for false statements by setting up lack of knowledge of such facts.[53]

These extensions at law of responsibility for false statements made without actual knowledge of the falsehood very materially diminish the difference between fraud at law and in equity. Nevertheless a broad difference continues to exist between fraud

W. 365 (1893). See § 104, *ante*, as to hardship as a defense to specific performance in such cases.

52 See long list of cases cited from most of the principal states, 3 Williston, Contracts, 2683, 2684, n. 40. In England the modern cases are opposed to the prevailing American doctrine because the courts insist on a "guilty state of mind" or actual intent to commit fraud as the basis of the action in tort for fraud and deceit. Derry v. Peek, 14 App. Cas. 337 (1889); Angus v. Clifford, [1891] 2 Ch. 449. In these cases the statements were false, and must have been known to be false, but because the court regarded them as made without conscious purpose of cheating, either because the party making the false statement thought it did no harm, or hoped that the statement would become true by later developments, it was held that the tort action for fraud and deceit would not lie.

53 In other words he is not chargeable if he had reasonable grounds for believing the truth of his representations though they were false in fact, but if he knew or should have known the truth of the matter he is chargeable. In Low v. Bouverie, L. R. 3 Ch. 82 (1891), the court held that because the defendant had forgotten the existence of mortgages on a certain life interest in a settlement of which the defendant was a trustee when he stated that no such mortgages existed, there was no fraudulent purpose, and therefore no fraud, based on Derry v. Peek, *supra* note 52. The rule in the United States is everywhere opposed to this indefensible position. See cases cited 3 Williston, Contracts, 2683, 2684, notes 39a and 40.

as the basis of the action for damages and fraud as the basis for rescission in equity. As rescission at law is now universally assimilated with rescission in equity by the adoption of equitable rescission at law, this distinction is really between rescission whether legal or equitable on the one hand and the action for damages at law on the other. Rescission in equity has always been based on false statements of material facts whether made innocently or not. A contract induced by a false statement, though innocently made without actual or constructive notice, and in reasonable belief of the truth of the statement, should not be enforced by the person making the false statement. The other party was justified in relying on the truth of the statement. The contract as made was not what he intended. To enforce it against him to his damage when he was misled into making the contract by the other's false statement would be grossly unfair, and opposed to well-settled equitable doctrines.[54] Now that the law has adopted the principles of equitable rescission, the contract may be rescinded at law as well as in equity for honest misrepresentations for which no action lies for damages in fraud and deceit.[55]

[54] Redgrave v. Hurd, L. R. 20 Ch. Div. 1 (1881), 3 Cook, Cas. Eq., 66; Smith v. Chadwick, 9 A. C. 187 (1884); Bates v. Cashman, 230 Mass. 167, 119 N. E. 663 (1918), Cook, *op. cit.* 72; Cowley v. Smyth, 46 N. J. L. 380 (1884); Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855 (1918); Leary v. Geller, 224 N. Y. 56, 120 N. E. 31 (1918). See many additional cases 3 Williston, Contracts, 2668, n. 87.

[55] As to rescission at law and its relation to rescission in equity see § 106, *ante*. That the defense of fraud to an action on the contract induced by fraud amounts to rescission, since the effect is to disaffirm and to restore the *status quo*, seems clear. Under the Code the final judgment in such cases, making final disposition of the controversy under the facts pleaded and proved, should restore the *status quo* in sustaining fraud as a defense. If fraud is set up by way of recoupment or counterclaim the contract is affirmed thereby, as pointed out in § 106, *ante*. Yet we find cases such as Hodgens v. Jennings, 148 App. Div. 879, 133 N. Y. Supp. 584 (1913) and Security Sav. B. v. Smith, 144 Iowa 203, 122 N. W. 825 (1909), 3 Cook, Cas. Eq., 65, 66, requiring common law scienter as an element of fraud set up as a defense to a simple contract. Certainly no such requirement exists if the fraud is set up to a contract under seal, since the defense is then equitable. Compare Hodgens v. Jennings, *supra*, with Canadian Agency v. Assets Realization Co., 165 App. Div. 96, 150 N. Y. Supp. 758 (1914) opinions in both cases by Justice Dowling. In

Professor Williston has made very clear the inconsistencies existing at law, not only between legal rescission and the action for damages for fraud, but also between that action and those cases of false representations in connection with sales of chattels which are enforced at law as warranties. It is clear that an express representation of fact by the seller in such cases amounts to a warranty, irrespective of whether the misrepresentation was made innocently or not, and the vendor is liable for breach of warranty, though on similar facts not involving sale or warranty, he would not be liable for damages in an action for fraud and deceit. A similar inconsistency exists between the action of fraud and deceit and estoppel. A false representation acted on by the person misled results in an estoppel of the misrepresentor from denying the truth of his statement. He must make good the truth of his representation whether he made it innocently or not.[56] Estoppel has been assimilated or absorbed into the law exactly as has equitable rescission.[57] Professor Williston has demonstrated beyond the possibility of reasonable contradiction that implied warranty in sales cases at law, and estoppel whether at law or in equity under modern practice, are remedial fictions invented and applied for the sake of the remedy. If the innocent misrepresentation was made by a vendor of chattels either as to his title or the quality of the goods, he must respond in damages, though similar representations made by a third person in order to induce the plaintiff to buy from the seller would not make the third person liable in fraud and deceit because of the innocence of the misrepresentation. Since the warranty is implied by law for the sake of the remedy, and does not exist as a contract in fact, we have the vendor held in damages for the false representation, but the third party held free of liability, though exactly the same words, spoken with the same purpose and effect, are involved in each case.

the latter case the action was to rescind in equity, and the court points out that scienter would be necessary in an action for damages for the fraud, though not in the action to rescind. Surely under the Code bringing law and equity together as a single system we cannot have such absurdities as two conflicting doctrines of rescission no more than we can have two conflicting doctrines of estoppel.

56 See 3 Williston, Contracts, §§ 1503–1507, as to warranty, and *ibid.* § 1508 as to estoppel.

57 See § 24, n. 5, *ante*.

So an estoppel results in charging a man with the actual loss arising from his misrepresentation, though innocent, not only when set up by way of defense against an action brought by the person estopped, but also as a basis of liability in an action brought against him by the person misled.[58] Though liable in such cases if the tag "estoppel" is applied to the action, the defendant is not liable if the suit is called an action for fraud and deceit. However hesitant the English courts may be to brand "a person in the position" of the defendant with fraud where actual fraudulent purpose did not exist, they nevertheless hold him liable if estoppel or breach of warranty, implied as remedial fictions by the courts, are established. Under code merger of law and equity and code pleading which require the giving of any and all relief, legal or equitable, to which the parties are entitled on the facts as pleaded and proved irrespective of the

58 Professor Williston illustrates by the case of a warehouseman liable through estoppel for an innocent misrepresentation to the buyer as to the amount of goods stored with him by the seller which are the subject-matter of the sale, or a bailee liable for the same reason when he issues a receipt for goods never received on which the plaintiff relied to his damage. In Low v. Bouverie (1891) L. R. 3 Ch. 82, 3 Cook, Cas. Eq., 59, the court expressly admitted this saying: "Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged; for example, if an assign of A sues A's trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands; or at law, if the assign of the debt should sue the alleged debtor and he was prevented from denying that the debt was due." The court held that this rule does not apply to the action for deceit because it is essential to prove that the misrepresentation "was made fraudulently," which means in England, apparently, with intent to cheat and defraud. In the United States, though the extreme English doctrine is not followed, there must be established at least legal notice of the fact misrepresented, expressed by the phrase, that he knew or should have known the falsity of his statement, or a positive assertion of the fact as within his knowledge when it was not, as a basis for the action for deceit. A purely innocent misrepresentation makes the person estopped liable only because another has relied on it to his damage. Why should he not also be liable when the action seeks damages for fraud and deceit? The statement in Lord v. Bouverie, *supra*, by Kay, L. J., that estoppel doesn't apply to fraud and deceit because of the necessity of proving scienter merely asserts the inconsistency; it does not explain it. See text following on this question.

tag or title which the plaintiff may have applied to his action, the defendant should be held liable in such cases, amending the pleadings, if necessary, to eliminate the stigma of fraud and deceit by substituting breach of warranty or estoppel where the facts would permit a recovery on either theory. This would be entirely consistent with regular practice under the Code as explained in an earlier chapter.[59] It is submitted, however, that code merger and simplified pleading make no change in the substantive requisites of the action of fraud and deceit at law. It has been found expedient to hold defendants liable for honest misrepresentations in cases of warranty and estoppel. It would be unwise to make those guilty of innocent misrepresentations liable in fraud and deceit for all damages resulting in all cases, merely because such liability attaches in the cases just referred to. Merger of law and equity does not change rules of substantive law and equity. They are merely brought together for administration by a single court as parts of a single system of law.[60] The action of fraud and deceit carries consequences, such as civil arrest before trial and body execution, which should not be applied in cases of merely innocent misrepresentations.

[59] See Ch. IV, § 22, *ante.*

[60] See Ch. IV, § 22, *ante.*

CHAPTER XXI

MISTAKE

§ 110. Remedies for Mistake. Mistake induced by misrepresentation, whether fraudulent or honest, has been considered in the preceding chapter. Mistake of a character to prevent the formation of a contract belongs to the law of contract.[1] Where a deed, mortgage, bill of sale, written contract or other written document, whether executed or executory, has been made under a mutual mistake of material fact, it will be reformed in equity so as to express the true intent of the parties. Under the modern cases in England and the thirty code states and territories in which law and equity have been merged, and in most of the other states in which such merger has been accomplished to a very substantial extent by statutes providing for equitable defenses in law actions and the easy transfer of actions from law to equity and from equity to law, reformation has become largely a matter of formal correction of the record. The substantial rights of the parties are protected by enforcing the transaction as the parties actually intended it, whether formal reformation has been made or not, as under law and equity combined the contract is enforceable only as it would be after reformation in equity, as of its original date. Reformation, as a formal matter is essential to correct such mistakes in deeds and mortgages of land, as the correcting of the record title is involved, and in correcting the record of ownership of corporate stock, and it may also be important to prevent transfer to purchasers for value without notice and the consequent loss of the plaintiff's equity, as in cases of negotiable instruments.

The formal character of reformation, applying only to written instruments, is apparent when we consider equitable relief for mistake in cases of parol contracts and executed sales and other executed transactions. Reformation is impossible in such cases,

[1] See 1 Williston, Contracts, §§ 20, 94, 95, 95a.

and it is not needed. The contract will be enforced only on the basis of the correction of the mistake. Where it has been executed, and in all other cases of executed transactions, the party injured by the mistake will be given relief. In most cases this involves the recovery of the additional money which he has paid because of the mistake. The transaction as made is permitted to stand, corrected by the repayment to the plaintiff of what, in equity and conscience, he is entitled to. In such cases the usual remedy is at law in *quasi*-contract, the law giving relief in this form by implying a promise where formerly equity alone gave relief. The details of relief for mistake in connection with the performance of contracts and other transactions will be discussed in the sections following in connection with the cases. Where the transaction stands subject to correction there is no rescission. The contract is enforced according to its force and effect in equity on the basis of the practical correction of the mistake. Except where formal reformation of instruments of title, or the like, is involved, this is just as true in cases of written contracts and deeds as of parol transactions. In some cases rescission is necessary to do justice between the parties, and rescission involves, as in the fraud cases discussed in the preceding chapter, the return of what has been received under the contract and the restoration of the *status quo*.

The basis of relief for mistake is the giving effect to the true intent of the parties, as found by the court, not the intent resulting from the mistake as expressed in the contract, conveyance or other transaction as made. It is true that the contract, deed or other transaction is binding on the parties at law as distinguished from equity, as the parties made it, and the intent which controls in the law of contract is the expressed, not the hidden intent of the parties.[2] Nevertheless where equity intervenes because of mistake, the court being satisfied by clear proof of the facts on which relief is sought, the contract as made is enforceable only as modified so as to eliminate the mistake and to give effect to the contract which the parties actually intended. A deed which equity will reform for mistake actually conveys, from the standpoint of equity, only such estate as will pass

[2] 3 Williston, Contracts, 2730–2736.

under its terms when the mistake has been removed. A legal contract arises in the first class of cases, and the legal title passes in the second, but it is an empty right so far as it is in conflict with the equitable right unless the equitable right is destroyed by conveyance of the legal title to a purchaser for value without notice. The equitable right prevails whenever brought in conflict with an opposing legal right. Under code merger the only result possible in these cases, provided the facts are pleaded and proved, is the enforcement of the contract with the mistake eliminated, or the rescission of the contract, as justice may require in the given case. The fundamental nature of equitable rights is illustrated in these cases, as in other situations heretofore discussed.[3]

§ 111. Reformation of Written Contracts, Deeds and Other Writings. A mistake made in reducing a contract to written form, if material, will be corrected by reforming the instrument to conform with the actual intent of the parties, and a deed or other executed written transaction will be corrected in the same way where a material mistake in carrying out the agreement of the parties has been made in drafting the instrument. Thus where the word "heirs" was omitted from a deed, resulting in the conveyance of a life estate only under the common law rule though a fee was intended to pass, equity reformed the deed by inserting the necessary words of inheritance.[4] A deed will be reformed in any case in which by mistake it conveys a different interest or more or less land than the parties intended.[5] In Massachusetts and South Carolina, though no question is made in reforming a deed which conveys more land than was agreed,[6]

[3] See § 19, *ante;* Chap. XVII, *ante,* as to real rights of the vendor in the vendor-purchaser relation; Chap. XVIII, *ante,* as to equitable easements or restrictions as real rights.

[4] Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391 (1890); Weller v. Rolason, 17 N. J. Eq. 13 (1864), 4 Kent. Com. 7, 8.

[5] Johnson v. Bragge, [1901] 1 Ch. 28; Cleghorn v. Zumwalt, 83 Cal. 155, 23 Pac. 294 (1890); McGinnis v. Boyd, 279 Ill. 283, 116 N. E. 672 (1917); Cole v. Fickett, 95 Me. 265, 49 Atl. 1066 (1901); Wirtz v. Guthrie, 81 N. J. Eq. 271, 87 Atl. 134 (1913); Rider v. Powell, 28 N. Y. 310 (1863) and cases in notes immediately following.

[6] Goode v. Riley, 153 Mass. 585, 28 N. E. 228 (1891). Here where the deed conveyed more land than the parties intended Justice Holmes

the courts refuse to reform the deed where less land was conveyed by the instrument unless the prior executory contract for the conveyance was in writing, because reformation would involve the conveyance of the additional land without a deed in writing and even without a written memorandum of the contract to sell, in violation of the Statute of Frauds.[7] In England and the other states generally the deed is reformed in either case without reference to whether too much or too little land was conveyed by the deed.[8] In either case equity acts contrary to the Statute in modifying in any material way a contract to convey or a conveyance of land by giving effect to the parol agreement not expressed in writing. The propriety of such action is clear where a conveyance has been made and the resulting change of position would make rescission of the contract inequitable and unjust. Certainly the mistake cannot be allowed to stand unremedied, and therefore the only alternative is between rescission, which would be unjust, and reformation which gives exact justice. The conveyance results in a trust which equity implies in favor of the party injured by the mistake, arising out of the change of position involved, just as in cases of so-called "partial performance" of contracts to sell land under the Statute, and the trust is enforced by reforming the deed here just as it is enforced in the form of specific performance in those cases.[9] It is not at all apparent why the courts in Massachusetts and South Carolina should make a difference

said: "But the effect of the evidence is not to show that no conveyance was made. It is only to show that no conveyance was made of part of the land embraced in the description. Obviously, therefore, it would be most unjust simply to rescind the whole transaction, and in order to do complete justice, the grantor who has used too extensive language should have a reconveyance, to set his title right on the face of the instruments. For, as things stand, a purchaser without notice could hold him to the words which he has used." It should be noted, in addition to the clear reason given for reforming the deed, Justice Holmes treats the grantor as still the substantial owner of the land erroneously included in the deed, reformation being required to set his title right on the face of the instruments so that he might not lose his interest by transfer to a purchaser for value without notice. See discussion of the nature of the right of reformation in § 110, *supra*.

7 Glass v. Hulbert, 102 Mass. 24 (1869); Westbrook v. Harbeson, 2 McC. Ch. 112, 3 Williston, Contracts, 2755.

8 See cases *supra* note 5.

9 See §§ 79–82, *ante*.

between reformation involving the transfer of additional land and reformation increasing the extent of the estate conveyed from a life interest to an estate in fee, or any other material modification of the deed as made.

As stated by Judge Holmes in a case cited above [10] conveyance of the land involved by the holder of the legal title to a purchaser for value without notice cuts off the equitable right arising as a result of mistake. This is true in all cases of mistake herein discussed, as it is in all cases of equitable rights cut off by conveyance of the legal title to a purchaser for value without notice, explained frequently in foregoing chapters and requiring no further citation of authority. That the right arises as a trust which equity implies, so that all subsequent takers not purchasers for value without notice are bound by the equity, follows as a necessary consequence of this doctrine.[11]

Executory written contracts will be reformed for material mistake as a matter of course if the Statute of Frauds is not involved, such as contracts of insurance, bonds, notes and other written contracts not involving the sale of an interest in land.[12] In Snell v. Atl. F. & M. Ins. Co.,[13] the policy by mistake insured the property as belonging to the agent for the owners who took it out, though the owners' interest was clearly intended to be covered. The policy was reformed after the loss, but enforced as of its original date. It is clear that in all such cases reformation is a perfunctory matter. What the court actually does is to enforce the policy as the parties intended it to be, as of its original date, so as to cover losses taking place before reformation was made. Under code merger of law and equity it is clear that the formal correction of the policy is entirely unnecessary,

10 Goode v. Riley, *supra* note 6.

11 See Cole v. Fickett, 95 Me. 265, *supra* note 5, where the right of the plaintiff because of a mistake in omitting land which should have been included in the deed was enforced as a trust against a subsequent purchaser who got title by a similar mistake, paying nothing, therefore, for the land so included in the conveyance to him.

12 Hathaway v. Brady, 23 Cal. 121 (1863); Palmer v. Hartford Fire Ins. Co., 54 Conn. 488, 9 Atl. 248 (1887); Home Ins. Co. etc. of Texas v. Myer, 93 Ill. 271 (1879); Neininger v. State, 50 Ohio St. 394, 34 N. E. 633 (1893), [error in naming the debtor in a contract of suretyship corrected].

13 98 U. S. 85 (1878).

unless equitable intervention is needed on the principle of *quia timet* relief, which normally is not the case.[14]

Where the executory contract involves a sale of an interest in land, or for other reason comes under the Statute of Frauds, though many cases permit reformation whether the change increases the amount of or estate in the land to be conveyed irrespective of the principle of part performance,[15] in other cases it is held that there must be such part performance as to make a change of position on the part of the party asking for relief so that justice demands enforcement of the contract with the mistake corrected.[16] Otherwise it is difficult to see on what theory equity interferes with the regular application of the Statute.

The earlier English rule that reformation of executory contracts cannot be had, not only because of the Statute of Frauds but also because of the parol evidence rule,[17] seems to have been changed by the later cases.[18] The parol evidence rule never interferes with the proof of facts which establish the jurisdiction of equity, such as fraud, estoppel, forfeiture or mistake, as the cases above cited abundently establish.

§ 112. Correction of Mistake Not Involving Reformation. Where by mistake a deed describes the land conveyed as containing a substantially greater area in acres or square feet than it actually contains, and the parties intended a purchase on the basis of the area or quantity rather than on the basis of a lump sum for the entire parcel in bulk, the statement of area not

14 As to *quia timet* actions see § 116, *post.*

15 Hunter v. Bilyeu, 30 Ill. 228 (1863); Olson v. Erickson, 42 Minn. 440, 44 N. W. 317 (1890); Neininger v. State, *supra* note 12; Metrop. L. Co. v. Lake Superior etc. Co., 101 Mich. 577, 60 N. W. 278 (1894). In some of these cases the decisions may be supported on the ground that a sufficient change of position had taken place to call for action by equity.

16 Osborn v. Phelps, 19 Conn. 63 (1848); Wirtz v. Guthrie, *supra* note 5; Safe Deposit Co. v. Diamond Coal etc. Co., 234 Pa. 100, 83 Atl. 54 (1894); Macomber v. Peckham, 16 R. I. 475, 17 Atl. 910 (1889).

17 See 3 Williston, Contracts, § 1553.

18 See Craddock Bros. v. Hunt [1923], 2 Ch. 136; United States v. Motor Trucks Ltd., 9 L. J. P. C. 46 (1924) cited 3 Cook, Cas. Eq., 221 n. See also Olley v. Fisher, 34 Ch. Div. 367 (1886) in which a mistake in the contract was corrected and the amended contract specifically enforced where there had been "part performance."

being mere matter of description but of the essence of the contract, a mutual mistake of a material fact directly relating to the transaction exists which the courts correct by enforcing the contract with compensation where the contract is executory, or by allowing a recovery of a corresponding *pro rata* part of the purchase price if the contract has been performed.[19] In the latter case there is no formal reformation involved, but merely a correction of the mistake by a recovery of the amount which would have been allowed as "compensation" for the shortage if the contract had been specially enforced. Whether the parties intended a sale of the parcel for a lump sum, in determining which the area was unimportant, in which case no such recovery can be had, is often a close question of fact.[20]

Money paid under a mutual mistake of fact, as in discharge of a debt already paid, or based upon a mistake in computation,[21] or in discharge of a liability assumed to exist because of the mistaken belief that something had happened which never happened,[22] may be recovered in an action of assumpsit based on the promise implied by law to repay the money which in equity and good conscience should be returned.[23] This is an-

19 Straus v. Norris, 78 N. J. Eq. 488, 79 Atl. 611 (1911); Paine v. Upton, 87 N. Y. 327 (1882); Wardell v. Birdsong, 115 Va. 294, 78 S. E. 564 (1913). In Lawrence v. Staigg, 8 R. I. 256 (1866) it appeared that the plot contained nearly 6000 feet more than the defendant had paid for at the contract price of 5¼ cents per foot. The court decreed a rescission of the conveyance unless the defendant paid *pro rata* for the excess area.

20 Examples of cases holding that the mistake as to area was not intrinsic, but a collateral matter of mere description, sale being for a gross sum, are Noble v. Googins, 99 Mass. 231 (1868); Belknap v. Sealey, 14 N. Y. 143 (1856); Rogers v. Olshoffsky, 110 Pa. 147, 2 Atl. 44 (1885).

21 Pool v. Allen, 29 N. C. 120 (1846), 3 Cook, Cas. Eq., 166; Millett v. Holt, 60 Me. 169 (1872). See also State Sav. B. v. Buhl, 129 Mich. 193, 88 N. W. 471 (1901); Woodruff v. Claflin Co., 198 N. Y. 470, 91 N. E. 1103 (1910).

22 Lowe v. Wells Fargo & Co., 78 Kan. 105, 90 Pac. 74 (1908).

23 In Talbot v. Nat. Bank etc., 129 Mass. 67 (1880), money paid by an indorser of a note, in the mistaken belief that it had been duly presented for payment and protested, was recovered. In Merchant's Ins. Co. v. Abbott, 131 Mass. 397 (1881), Abbott had assigned to Denny, Rice & Co. his claim for insurance money due from the plaintiff Company because of loss by fire, and this sum was paid to the assignees and received by them in payment of a valid debt due from Abbott. Abbott had

other illustration of the giving of relief at law which at first could be had only in equity.

Money paid under a compromise agreement entered into under a material mistake of fact may be recovered.[24] It is clear that no mistake exists and the compromise must stand as made when the existence of the fact in question is uncertain and the com-

caused the fire, and the court held that the plaintiff could recover the amount of their payment from him because of his fraud, but could not recover from Denny, Rice & Co., as there was no unjust enrichment of them since they received the money in good faith in discharge of a valid claim, so that no trust attached to the money in equity and no promise to repay it would be implied at law. The court treats Abbott's assignees as purchasers for value without notice. Of course title to money always passes on delivery, but the money was paid and received under a mutual mistake of fact that the Insurance Co. owed it to Abbott. It could not have been recovered from the Insurance Co. either by Abbott or his assignee. The transfer of possession by mistake should make no difference. The assignees held the plaintiff's money solely because of the mutual mistake as to the plaintiff's liability under the assigned claim which was material not "extrinsic." See in support of the position of this case, 3 Williston, Contracts, 2787, 2788, citing among other cases Ball v. Shepard, 202 N. Y. 247, 95 N. E. 719 (1911) and Belloff v. Dime Sav. B., 118 App. Div. 20, 103 N. Y. Supp. 273 (1907) aff'd 191 N. Y. 551, 85 N. E. 1106. See to same effect, N. Y. Title & Mtg. Co. v. Title Guarantee & Trust Co., 206 App. Div. 490, 201 N. Y. Supp. 529 (1923). It should be clear that the doctrine of purchaser for value as to the money has no application. The money is parted with in satisfaction of a claim under a mutual mistake that a valid claim existed, and if the mistake is material the amount should be recovered. The only possible ground for supporting these cases is that there is no unfairness in allowing the assignee to keep the money so received in good faith. The equity arising from mistake is cut off if the property affected, as in the reformation cases considered in § 111, is conveyed to a purchaser for value, but that situation is not involved here. Professor Ames supports these cases as applications of the doctrine that as between two innocent parties victimized by the fraud of another, the party having legal title to the money will not be disturbed, equity leaving the loss where it has fallen at law, in the absence of unjust enrichment or negligence on the part of the party having legal title to the money so paid. Ames, Lectures Legal Hist. 278 *et seq.* This doctrine ignores the element of mistake altogether.

24 Stuart v. Seers, 119 Mass. 143 (1875), [mistaken assumption as to payment as basis of settlement]; Rheel v. Hicks, 25 N. Y. 289 (1862), 3 Cook, Cas. Eq. 253 [bastardy claim settled on mistaken assumption that woman was pregnant]; Wheadon v. Olds, 20 Wend. 174 (N. Y. 1838); Meinecke v. Sweet, 106 Wis. 21, 81 N. W. 986 (1900).

promise is intended to settle the dispute irrespective of what the fact may prove to be, the parties having in mind the uncertainty as to the fact in question and assuming the risk.[25]

A release under seal could not be rescinded at law for fraud or mistake and therefore an action in equity to set it aside was necessary, as we have seen heretofore, though under modern practice the defense may be set up as a bar to the release when pleaded as a defense to an action on the claim released, under statutes providing for equitable defenses in law actions.[26] These are cases of mistake induced by misrepresentation either fraudulent or innocent, and are discussed in the preceding chapter. Where the settlement is accompanied by a general release expressly covering all liability of every description, it is settled law that it does not cover liability from facts of which both parties are ignorant, and the written release will be reformed in equity accordingly,[27] though under the modern practice there

25 Stover v. Mitchell, 45 Ill. 213 (1867); Lamb v. Rathburn, 118 Mich. 666, 77 N. W. 268 (1898); Sears v. Grand Lodge etc., 163 N. Y. 374, 57 N. E. 618 (1900), 3 Cook, Cas. Eq., 257. [Compromise on claim for insurance on life of husband absent for over nine years, $666 to be paid in any event, balance if proof that he was living was not produced in a year. Insurance Co. held for $666 though husband returned before payment.]

In McArthur v. Luce, 43 Mich. 435, 5 N. W. 451 (1880), the court refused to permit an action for money paid in settlement of a claim for cutting timber on defendant's land, both parties having employed surveyors and mistakenly believing that plaintiff had cut defendant's trees. Four years later the mistake was established by a new survey. The court said: "In the settlement of disputed questions, where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation, and not carelessly settle, trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness, and breeds litigation after witnesses have passed beyond the reach of the parties." Here the parties were mutually mistaken, reasonably relying on surveys made for both sides, as to the one fact on which liability depended. That fact was assumed by both as the basis of the settlement. Apparently the settlement was not a compromise on the basis of uncertainty as to whether the plaintiff had cut timber beyond his line. If so the plaintiff should have recovered.

26 See § 21, *ante*.

27 Gandy v. Macauley, 31 Ch. Div. 1 (1885); Reggio v. Warren, 207 Mass. 525, 93 N. E. 805 (1910). As to the construction and effect of general releases see 3 Williston, Contracts, § 1825.

is no occasion for an action to reform as the defense of mistake may be set up with the same force and effect by way of reply when the release is pleaded as a bar to an action on the original claim. A mutual mistake of fact, the existence or absence of which was clearly the basis of the settlement, though without fraud or misrepresentation, may be set up as a bar to the settlement in accord with the principle of the cases referred to above.[28]

Other cases of mistake resulting in the right to rescind the contract or to enforce it only as modified to accord with the actual intent of the parties are discussed in the following section discussing the distinction between material or "intrinsic" mistake and mistake which is "extrinsic" or collateral and therefore immaterial.

§ 113. Intrinsic as Distinguished from Extrinsic or Collateral Mistake. The different classes of cases discussed in the preceding section illustrate this distinction, as every mistake for which relief will be given either at law or in equity must be "intrinsic," viz., it must be a mistake as to a fact which is a material component part of the contract, so that enforcement of the contract as made without modification because of the mistake is contrary to the intent of both of the parties. If the fact about which one or both may be mistaken is collateral in the sense that the contract is not made on the express or implied agreement, warranty of understanding that the fact exists so that it is a matter not entering into the contract, with reference to which each takes the chance or assumes the risk, the contract stands as made. Thus in the cases of mistake as to the area of the land sold, if the contract specifies the area and it appears

[28] See cases *supra* notes 24 and 25, and the distinction brought out in those cases. Where both parties are clearly mistaken as to the extent and nature of the injuries sustained by the plaintiff in a personal injury case, a settlement and release may be rescinded, at least to the extent of the mistake. Lumley v. Wabash R. Co., 76 Fed. 66 (1896); Tatman v. Philadelphia B. & W. R. Co. (Del. Ch.) 85 Atl. 716 (1913). The evidence must be clear that a real mistake of fact exists which was not the subject of compromise in the settlement. The presumption is that the settlement is valid and final, including all damages arising from the accident which the parties might fairly be regarded as having in mind, and the risk as to the extent and severity of which is assumed in the settlement. See 3 Williston, Contracts, § 1551.

that the parties fixed the consideration on the basis of quantity in acres or square feet, the area or quantity is an intrinsic, material term of the contract, and a mutual mistake as to the area demands correction; if the sale was in bulk for a lump sum, not by the acre or square foot, the price not having been arrived at on that basis, any statement in the deed or contract as to area being mere description the accuracy of which is not warranted or agreed upon as a term of the contract, the mistake is as to an extrinsic fact, like the quality of the soil, or its adaptability for building purposes, or the quantity and quality of mineral deposits which may be found beneath the surface, or any other facts as to the quality or desirability of the land with reference to which the parties take their chance.[29]

Money paid in discharge of a debt already paid in the mistaken belief that it had not been paid, or based upon a mistake in computation, or based on any other mistake of fact directly relating to the transaction may be recovered because the mistake in such cases is clearly intrinsic.[30] Cases of mistake in compromise agreements are particularly good illustrations of this distinction. As explained above [31] if the mistake is as to a fact assumed to exist by both parties as part of the basis of the compromise, uncertainty as to that fact not being a part of the compromise, so that they do not assume the risk of what the fact may prove to be as part of the compromise, the mistake is intrinsic and must be corrected, but not if they are uncertain as to the fact and compromise on the basis of taking the risk. Is it really because the mistake is regarded as collateral that a payment, made to a third person at the request of another who induced such payment by his fraud, cannot be recovered from the third person if such payment was received in good faith in payment of a valid debt due from the fraudulent party? Both parties acted in the belief that the money was due to the fraudulent party in ignorance of his fraud. Was this mistake a proximate producing cause of the payment, or was it a mistake as to a collateral fact not directly or intrinsically involved in the payment? The cases do not approach the problem from this angle. It is argued that the transaction is the same as it would

29 See *ante* § 110, notes 19 and 20.

30 See *ante* § 110, notes 21–23.

31 See *ante* § 110, notes 24–27.

have been if the money had been paid to the fraudulent party and he had used it in paying his debt, in which case admittedly he alone would be liable.[32] This argument begs the question. If the payment, as an executed transaction, was the direct result of this mistake of fact it ought not to stand. That the mistake is intrinsic and not collateral is admitted by the cases which hold that if no debt exists in favor of the third person who received payment, though he believed that a valid debt existed, the money so paid may be recovered because of the mistake.[33] Where a check is presented for payment by the payee and paid by the bank on which it is drawn, it is settled law that the bank cannot recover the money on discovering that the drawer of the check did not have sufficient funds on deposit to meet it. The mistake is collateral, not directly involving the act of payment, as the check was genuine and payment might well have been made though it involved an overdraft by the drawer.[34] In this

[32] See cases discussed *supra* note 23, especially Merchant's Ins. Co. v. Abbott.

[33] Thus where A forged a mortgage on another's property, and subsequently forged another mortgage on the same property for a larger sum, arranging that the second mortgagee pay the first mortgagee the amount of the first mortgage, the balance being paid to A, the second mortgagee was allowed to recover that payment because of the mistake in Strauss v. Hensey, 9 App. D. C. 541 (1896) and Grand Lodge v. Towne, 136 Minn. 72, 161 N. W. 403 (1917) discussed 3 Williston, Contracts, 2788. See cases in Michigan and Alabama *contra* cited and discussed in the same place. Professor Williston says that recovery should be allowed because the defendant was not a purchaser of the money for value, as the defendant was in such cases as Merchant's Ins. Co. v. Abbott and the other cases cited in note 23, *supra*. But that point is not relied on in any of these cases. It is difficult to see how the defendant's receiving the money in good faith for value helps him. In most cases of payment under mistake without fraud in which recovery is allowed the defendant received the payment for value and in good faith. If the mistake is a proximate producing cause it is intrinsic and justice demands that the money be returned. The doctrine of purchaser for value would arise only where the money or property is transferred by the person receiving it through fraud or mistake to a third person who is a purchaser for value without notice, a situation not involved in these cases.

[34] Chambers v. Miller, 13 C. B. (N. S.) 125, 143 Eng. Rep. 50 (1862), 3 Cook, Cas. Eq., 237. Cases of forged drafts or checks accepted or paid by a bank, such as Price v. Neal, 3 Burr. 1354, 1 W. Bl. 390, and kindred cases are based on special rules of banking and negotiable paper turning finally on public policy in banking. They should not

case it cannot be said that both parties necessarily relied on the fact that the drawer had a sufficient balance on deposit. In the cases above discussed there can be no doubt that the payment necessarily involved an assumption by both parties that the money paid was due and owing to the party whose debt to the defendant was discharged in this way, and that this fact was the efficient producing cause of the payment.

Nonexistence of a thing which is the subject-matter of the contract, the existence of which is actually assumed by both parties when the contract was made, is a clear case of intrinsic mistake. Thus a contract to sell a horse which, unknown to the parties, had died before the contract was made, cannot be enforced.[35] A purchaser of an annuity may recover the price paid if at the time the annuity was to pass to him it had been ended by the death of the annuitant.[36] Money paid for land under a deed which was void because no land corresponding to the description of the deed could be found, may be recovered for the same reason.[37] The purchaser of a reversion which at the time had ceased to exist because it had been destroyed by a recovery suffered by a tenant in tail, recovered the price paid because of the mistake of the parties as to the existence of the reversion sold.[38] This is not merely a mistake as to the title of the vendor

be permitted to upset the fundamentals of the law of mistake.

35 Allen v. Hammond, 36 U. S. (11 Pet.) 63, 71 (1837).

36 Strickland v. Turner, 7 Ex. 208, 155 Eng. Rep. 919 (1852), 3 Cook, Cas. Eq. 265. For additional cases of sales of chattels unenforceable because of the non-existence of the thing sold, see 3 Williston, Contracts, 2766, n. 1. These cases are sometimes based on impossibility of performance by the seller, the buyer being also relieved because of the inability of the seller to perform. Failure of consideration is another way of expressing the defense to enforcement and the reason for recovery of the price if it had been paid. Clearly no enforceable contract exists in such cases, and money paid thereunder is recoverable because reason and justice require it, as in cases of contracts capable of being performed where intrinsic mistake exists, cited and discussed heretofore. This rule is expressed in the Uniform Sales Act, § 7 (1).

37 D'Utricht v. Melchor, 1 Dall. 428 (Pa. 1789).

38 Hitchcock v. Giddings, Daniell Eq. Exch. 1 (1817), 3 Cook, Cas. Eq., 271. In Martin v. McCormick, 8 N. Y. 331 (1854), the owner of land which had been sold for taxes bought the tax lease from the defendant, both believing that the tax lease was valid, when in fact it had been destroyed by a valid redemption which the parties mistakenly thought had been too late. He re-

in these cases, but as to the existence of the interest attempted to be sold. A mistake as to the vendor's title is a valid defense to enforcement of the contract against the purchaser, since every contract for the sale of land involves an implied agreement that the vendor's title is good in the absence of an express agreement to the contrary.[39] The same is true of executory contracts to sell chattels, but a peculiar difference exists between executed sales of chattels and conveyances of land if subsequently the title is found to be defective in both cases. The law implies a warranty of title in sales of chattels unless there is an agreement that the buyer take such title as the seller may have. In discussing the effect of innocent misrepresentation we have seen how the law has departed from the requirement of guilty knowledge as a condition of recovery in these cases.[40] The mistake is made good by the implied warranty which is, no doubt, based on the mistake. Where for any reason there is no warranty of title, as in the case of a sale under execution, the sale may be rescinded because of mistake as to the title, it being quite obviously intrinsic, assuming that the buyer did not expressly agree to take such title as the seller had, in which case the mistake would be collateral or immaterial.[41] The grantee of land cannot maintain an action because of a defective title unless there are express covenants of title in the deed. The warranty which was implied between the feudal lord and tenant "of common right" as an incident of feudal tenure was ended by the statute *Quia Emptores* in 1290 which did away with subinfeudation and therefore with tenure in the feudal sense between feoffor and feoffee. Thereafter express covenants of title were used in conveyances instead of the ancient implied warranty, and no covenant of title has since been implied in a conveyance

covered the amount paid by him because the tax lien which he purchased did not exist.

39 See § 75, *ante*, as to marketable title; Moore v. Williams, 115 N. Y. 586, 22 N. E. 233 (1889).

40 See § 109, *ante*, as to innocent misrepresentation and warranties in the sale of goods.

41 Dresser v. Kronberg, 108 Me. 423, 81 Atl. 487 (1911), 3 Williston, Contracts, 2772, the court criticising cases in Indiana and Illinois holding to the contrary on the ground that at judicial sales the purchaser assumes the risk as to the title, and the mistake is therefore immaterial. Though no warranty is implied, absolute failure of title is a contingency not in the minds of the parties, and therefore rescission is required.

of land.[42] Because of this historical development, a grantee accepting a deed conveying land without express warrranty is regarded as taking such title as the grantor had, with no right to rescind because of a mutual mistake of title, which is treated as collateral, and he has no remedy whatever if the deed contained no covenants of title.[43]

The usual collateral mistakes which give no right to rescind or modify the contract are mistakes as to the quality, desirability or fitness of the property involved, mistakes as to collateral facts which affect the value or desirability of the subject-matter of the transaction, where there is no express or implied representa-

[42] See Walsh, History of English and American Law, 303.

[43] Whittemore v. Farrington, 76 N. Y. 452 (1879); Phillips v. Hudson, 31 N. J. L. 143 (1864); Dorsey v. Jackman, 1 Serg. & R. 42 (Pa. 1814), 3 Cook, Cas. Eq., 275–280. The cases cited *supra* notes 37 and 38 involve not merely a defective title, but the entire non-existence of the interest which the defendant purported to convey, the existence of that interest having been necessarily assumed by the parties as the basis of the transaction.

The sale of a patent which turns out to be invalid illustrates the difference between intrinsic and collateral mistake and the very narrow basis on which the question turns. In the United States it is generally held that the mistake as to the validity of the patent is intrinsic and the money paid therefor may be recovered, as the parties contracted on the basis of the existence of a valid patent. Darst v. Brockway, 11 Oh. 462 (1842); Hiatt v. Twomey, 21 N. C. 315 (1836). The English view is *contra*. "Each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent such as it was, each acting on his own judgment." Hall v. Conder, 2 C. B. N. S. 22, 140 Eng. Rep. 318 (1857). In Taylor v. Hare, 1 Bos. & P. (N. R.) 260, 127 Eng. Rep. 461 (1805), the court held that money paid for a license to use an invention could not be recovered on discovery that the patent was void and the license thereunder of no value. Money paid for a patent should be recovered where no valid patent exists, unless the purchaser actually intended to assume the risk of its validity. Johnson v. Williamantic Linen Co., 33 Conn. 436 (1866). The subject-matter of the sale does not exist in such cases. But the license to use the patent, regarded as an agreement not to interfere with such use, is actually carried out by the agreed noninterference. However, the money was paid on the assumed basis of fact that the license by the defendant was necessary because of the validity of the patent, and the better view is that the money should be recovered because of the mistake. See Keener, Quasi-Contracts, 37–39. *Contra*, Woodward, Quasi-Contracts, § 62. The above cases are reported or cited in 3 Cook, Cas. Eq., 281–286.

tion by the other party which causes the mistake. There is a very close relation between these cases and cases of innocent misrepresentation discussed in the preceding chapter. In the absence of such misrepresentation there is no duty to point out to the other party facts which may make the property offered to him seem less desirable, except in the extreme cases discussed in the chapter on fraud where silence amounts to misrepresentation, nor is there a duty to disclose to the seller facts which will make him place a higher value on his property. Each takes a chance as to all such collateral matters.[44] They are not collateral, however, if they are so definitely part of the transaction that both parties must be regarded as assuming them to exist as the basis of the contract, conveyance or sale. To enforce the contract or to allow the executed transaction to stand as made in such cases would be contrary to what the parties actually intended, as unjust in every respect as to enforce it against a party misled by innocent misrepresentation.[45]

§ 114. Unilateral Mistake. Reformation of writings to correct mistake, and the enforcement of contracts only as such mistake is corrected though formal reformation is not involved, discussed heretofore, are based on mutual mistake of both parties, so that the resulting transaction as reformed or enforced carries out what the parties actually had in mind. Serious situations of hardship arise where only one of the parties is mistaken as to a material fact, the other party intending the contract as made without mistake as to the fact about which the other party is mistaken.

No difficulty arises in cases of unilateral mistake in deeds of gift or transactions by way of gift. The gift will be rescinded because of the mistake, as the donor's intent is alone material,

[44] Laidlaw v. Organ, 15 U. S. (2 Wheat.) 178 (1817); Cavanagh v. Tyson, 227 Mass. 437, 116 N. E. 818 (1917) and cases cited therein; Sample v. Bridgeforth, 72 Miss. 293, 16 So. 876 (1894), [Note not secured by first lien as parties believed]; Wood v. Boynton, 64 Wis. 265, 25 N. W. 42 (1885), and cases cited in preceding notes illustrating extrinsic or collateral mistake.

[45] The cases cited in the notes above in this section are ample illustrations. They might be extended at great length, as all mistakes of fact are either intrinsic or collateral, involving the application of this distinction.

the donee giving or promising nothing in return.[46] Unilateral mistake in the contents of a deed or other writing on the part of the signer may be established to show that no contract exists, but he will be bound by the contract or deed as made if he signs the instrument without any reasonable effort to learn its contents or under circumstances establishing his negligence. The mistake as to the contents of the writing must, therefore, have a reasonable explanation other than the carelessness or negligence of the signer if the deed or contract is to be vitiated for that reason. It will not be reformed to accord with the signer's intent because that would be contrary to the intent of the other party, unless the other party elects to take such reformation instead of rescission.[47] Where mistake as to the contents and subject-matter of writings is not involved, it is everywhere settled that the contract will be enforced as made in spite of unilateral mistake by either party if it has been wholly or partially performed so that rescission would operate to the injury of the other party.[48] The difficult question on which the authorities are in conflict arises where an honest mistake has been made as to an essential fact by one of the parties which is discovered and the contract repudiated by him before performance so that both parties may be restored to *statu quo*. The usual case in which the courts have permitted rescission has been where a bid has been made by a contractor very materially

[46] Lister v. Hodgson, L. R. 4 Eq. 30 (1867), 3 Cook, Cas. Eq., 348. See cases cited 3 Williston, Contracts, § 1556, n. 85.

[47] Thus in Page v. Higgins, 150 Mass. 27, 22 N. E. 63 (1889), in an action for breach of warranty of title, it appearing that defendant did not have title to certain land included in the deed without his knowledge or intent, the plaintiff believing that he was purchasing the land so included, the defendant's unilateral mistake being set up as an equitable defense under the statute, the court said: "If the defendant is not bound by the deed as it is, it cannot be reformed against the consent of the plaintiff, so as to exclude the Cheever lot, because that would be to make a contract which the plaintiff never intended to make. If the deed were declared void, the defendant cannot retain the consideration paid." See also Brown v. Lamphear, 35 Vt. 252 (1862). These cases turn on whether a valid contract or deed exists, depending on whether there has been a meeting of the minds of the parties objectively expressed, a question of the formation of contract. On this question see 1 Williston, Contracts, § 35, 3 *ibid.* § 1577.

[48] See cases in note following.

less than the bidder intended because of error in omitting items which should have been included, or in adding the total of items included in the bid.[49] There can be no doubt that so far as the

[49] St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500 (1916). By mistake defendant omitted the item for iron work, $2350, from his estimate in making a bid for the contract to erect a church building. The court quotes Story, Equit. Jurisd., § 138. "But where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner making redress, and no intervening rights have accrued, and the parties may still be placed in *statu quo*, equity will interfere, in its discretion to prevent intolerable injustice." The court also quotes Hearne v. Marine Ins. Co., 20 Wall. 448: "A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Where the minds of the parties have not met,* there is no contract, and hence none to be rectified." The court cites as not distinguishable Moffett, Hodgkins & Co. v. Rochester, 178 U. S. 373, though notice of the error was given when the bids were opened, but as the bid under the statute applying could not be withdrawn after being submitted, that fact made no difference. The court quotes from Fehlberg v. Consine, 16 R. I. 162, referring to cases of unilateral mistake in executory contracts: "In these cases the parties have not, in reality, agreed; their minds have not met; and if one, without fault on his part, has bound himself to something materially different from what he supposed it to be, which can be annulled without loss or injustice to the other side, it is deemed . . . inequitable to enforce it." Quotations from Werner v. Rawson, 89 Ga. 619, and Scott v. Hall, 58 N. J. Eq. 42 also sustain rescission for unilateral mistake. For the proposition that the minds of the parties do not meet in case of unilateral mistake as to price the court also cited Rowland v. N. Y., N. H. & H. R. Co., 61 Conn. 103, DeVoin v. DeVoin, 76 Wis. 66, and Webster v. Cecil, 30 Beav. 62.

In Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564 (1907) rescission was refused where the bidder's mistake consisted in an error of $421, over 20% of his bid, in adding the 34 items of a list of lumber given him by the other party on which to make his bid. The court expressly recognizes the rule laid down in the above cases, but held that because the mistake was without excuse it was negligent, and the bidder was held to his bid as made. The court distinguishes Board of School Comm'rs v. Bender, 72 N. E. 154 (App. Ct. Ind.) where rescission for unilateral mistake was allowed, because it was excusable, and Harran v. Foley, 62 Wis. 584, because in that case no contract arose because "the minds of the parties never met, the seller intending to state $261.50 as the sale price, and the buyer understanding the price to be $161.50. The court said: "The contract was exactly what each party understood it to be and

express formal contract is concerned the bidder is bound by the acceptance of his bid, and that its enforcement will result in depriving him of that much money of which the other party will get the benefit by taking advantage of the mistake. How do these cases differ from cases of unilateral mistake as to the contents of writings? In those cases no contract arises because the minds of the parties do not meet, assuming the absence of negligence. In cases of bids duly accepted or other more informal contracts there is, to be sure, no mistake as to the words and figures used, but the contract as made is as different from the contract intended by the mistaken party in the one case as in the other. The minds of the parties as expressed meet in both cases. In each case we must get back of the expressed intent to find absence of mutual assent, and we find such absence in the one case exactly as in the other. This seems to be recognized in several of the cases quoted in the notes.[50] It is high time that the courts take a definite stand on this question based on a definite principle. Do the courts permit rescission in these cases because there is no "meeting of the minds," in other words no mutual assent? If so, is this a rule at law, which should be applied both at law and in equity as the occasion may be, or is it another case in which equity is modifying the law in these cases because of the hardship involved? With rescission for misrepresentation, innocent or fraudulent, at law and in equity, now fully merged, as we have seen in the preceding chapter, and with law and equity substantially merged under codes and statutes in England and most of the states,

it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts." . . . In Tatum v. Coast Lumber Co., 16 Idaho 471 (1909), in which rescission for such mistake was refused, the parties had entered upon performance to such an extent that the *status quo* could not easily be restored. See annotations to that case, 23 L. R. A. (N. S.) 1109.

50 See *supra* note 49. Professor Williston says, 3 Contracts, 2796, "Moreover, in a developed system of jurisprudence any distinction in this matter between written and oral contracts seems based on no sound principle and can hardly persist. Either all or none will be subject ultimately to the defense of unilateral mistake."

the controlling principle, whatever it may be, should be stated and applied without merely technical discussion as to whether it is "legal" or "equitable." It seems clear enough, as a matter of historical development, that at law these contracts originally bound the parties as made, and that equity intervened in cases of unilateral mistake as to contents of writings, and later in other cases, to prevent intolerable injustice arising out of the strict rule at law that the expressed intent of the party should govern irrespective of his unilateral mistake, where he has not been grossly negligent, and where rescission will restore the *status quo* without injury to the other party other than to deprive him of the unconscionable advantage which he would get by taking advantage of the mistake. With the rule in equity now modifying the legal rule under the actual merger of law and equity now accomplished in these cases practically everywhere under codes and under statutes permitting equitable defenses in law actions, we may fairly say that mutual assent exists in these cases where equity will not intervene because of the gross negligence of the mistaken party or because rescission would be unjust to the other party where the *status quo* cannot readily be restored, but where there is no such negligence and the *status quo* may be restored without material injury to the other party, the actual absence of mutual assent due to a material and intrinsic mistake by one of the parties is the basis for rescission which will now be enforced without regard to whether such rescission is "at law" or "in equity." Certainly the same rule must apply whether or not writings or land or articles of unique value are involved. Equitable intervention is based on the injustice arising from enforcing the mistake, not on the accident that writings, land or unique chattels are involved in the particular case.

§ 115. Mistake of Law. The general principle that no relief will be given for a mistake of law not also involving a mistake of fact goes back, as Professor Williston says, to a decision by Lord Ellenborough at the beginning of the nineteenth century,[51] no distinction between mistakes of fact and mistakes

[51] Bilbie v. Lumley, 2 East 469. 102 Eng. Rep. 448 (1802), 3 Williston, Contracts, 2797.

of law having been made before that case, and relief in cases of mistake of law having been given both at law and in equity in several earlier cases.[52] It developed from the general principle, necessary to the administration of the law of crimes and torts, that ignorance of the law is no excuse. But the enforcement of a contract based on mutual assent is a very different matter from enforcing a penalty or recovering damages for a wrongful act. If the executory contract or executed transaction is materially and intrinsically different from what both parties intended because of their mutual mistake as to the law applying to the facts of the transaction about which they are not mistaken, it is entirely clear that there is the same absence of actual mutual assent to the contract and the same failure to accomplish their purpose in the executed transaction as where the mistake is as to an intrinsic and material fact, and therefore exactly the same reasons exist for giving relief.

No particular difficulty exists where the mistake, though in the form of a conclusion of law, involves necessarily mistake of fact on which the legal conclusion depends. In such cases relief is given both at law and in equity in accordance with the principles discussed in the foregoing sections.[53] A misrepresentation of law by one party to the other, inducing the mistake in the party seeking relief, will be a sufficient ground for rescission whether made innocently or not. Thus where an insurance agent, though he knew the insured had no insurable interest, nevertheless told him the policy would be "all right" and

[52] 3 Williston, *ibid.* 2797, citing (notes 8, 9, 10) Hewer v. Bartholomew, Cro. Eliz. 614, 78 Eng. Rep. 855 (39 Eliz.); Bonnel v. Foulke, 2 Sid. 4; 82 Eng. Rep. (1659); Turner v. Turner, 2 Rep. Ch. 154, 21 Eng. Rep. 644 (1679); Bize v. Dickason, 1 T. R. 285, 99 Eng. Rep. 1097 (1786), the latter case by Lord Mansfield.

[53] In Cooper v. Phibbs, L. R. 2 H. L. 149 (1867), 3 Cook, Cas. Eq., 395 n., rescission of a contract to lease a fishery was allowed because of a mutual mistake as to the ownership of the fishery, which was really the property of the plaintiff lessee. Commenting on this case in Alton v. First Nat. B. of Webster, 157 Mass. 341, 32 N. E. 228 (1892), Judge Holmes said (p. 343): "He (Lord Westbury) only meant that certain words, such as ownership, marriage, settlement, etc., import both a conclusion of law and of facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, that a mistake induced by such an assertion is a mistake of fact."

would be paid, the court held that the insured could recover his premiums on discovering the invalidity of the policy.[54] The taking advantage by one party of a mistake of law which he knows the other party is laboring under is a situation requiring equitable relief.[55] In these cases relief is given as in corresponding cases of misrepresentation or concealment of facts or taking advantage of mistakes of fact. A representation of law is generally a mere statement of opinion on which the other party cannot rely in the usual case, but where the mistake arising out of the misrepresentation is reasonable, and the mistake is the inducing cause of the contract or other transaction, it is clear that it ought not to stand, whether the mistake was mutual in the absence of fraud or was induced by a wilfully false statement.

Mistake in using the terms in a deed or other writing necessary to accomplish the intent of the parties, though entirely a mistake of law as to the legal effect of the language used, will be corrected by reformation exactly as will corresponding mistakes of fact in connection with the execution of written contracts, deeds and other writings. The omission of the word "heirs" from a deed intended to transfer a fee, corrected by reforming the deed by inserting that word, is an illustration.[56] A policy of fire insurance which covered the interest of one only of the three owners of the insured property, was reformed so as to cover the interests of the others, though the mistake was not of fact but solely as to the legal effect of the language of the policy.[57]

[54] British Workman's etc. Assn. Co. v. Cunliffe, 18 L. T. Rep. 502 (1902). The court said: "It was obvious that his meaning was the respondent would be entitled to enforce payment of the policy money though he had no insurable interest. There could be no doubt that the insurance company, having obtained payment of money on that statement, ought not to be allowed to retain it."

[55] Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958 (1894). The court said (p. 35), after referring to the supposed rule that a mistake of law pure and simple excludes equitable relief: "It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair and deceptive conduct, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief." See additional cases to same effect cited, 3 Williston, Contracts, § 1591, n. 54.

[56] Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391 (1890).

[57] Sneil v. Atl. F. & M. Ins. Co., 98 U. S. 85 (1878).

An indorsement of a note intended to be without recourse was reformed to accord with the intent of both parties, though their mistake was only as to the legal effect of the form of indorsement which was used.[58] In any case, though the form of the instrument and the terms used are what the parties intended, the only mistake being as to the legal effect which is materially different from what they intended to accomplish, the instrument will be reformed to carry out their real intent, according to the decisions in nearly all the states.[59] In Illinois and Pennsylvania, and in a few other scattered cases the principle that no relief will be given in cases of mere mistake of law is consistently applied in these as in other cases, contrary to the general rule, though the hardship and injustice involved apparently were appreciated by the judges so holding, who felt that it was nevertheless necessary to maintain the principle that "ignorance of the law is no excuse." That relief in these cases is granted in most jurisdictions surely means that the maxim in question has nothing to do with the matter. If instruments are reformed for mistakes of law exactly as they are reformed for mistakes of fact, and for the same reason, viz., the enforcement of the true contract or executed transaction as actually intended by the parties instead of one which neither party intended, it would seem to follow that the same principle should apply to other contracts and executed transactions where the reformation of a writing is not involved. The tendency of the cases is definitely in that direction, but there are so many confusing situations in connection with the cases in which the question of mistake of law has been discussed and applied, and the doctrine that no relief shall be given in cases of such mistake has been so generally acquiesced in by way of *dictum* at least, that it is difficult to say in most jurisdictions just how the law on this subject stands.

58 Stafford v. Fetters, 55 Iowa 484, 8 N. W. 322 (1881); Western etc. Co. v. Stickleman, 122 Iowa 396, 98 N. W. 139 (1904), 3 Cook, Cas. Eq., 457–8.

59 In re Saxon Life Assur. Soc. 2 J. & H. 408, 70 Eng. Rep. 1117 (1862); Stedwell v. Anderson, 21 Conn. 139 (1851); Park Bros. & Co. v. Blodgett etc. Co., 64 Conn. 28, 29 Atl. 133 (1894); Marine Sav. B. v. Norton, 160 Mich. 614, 125 N. W. 754 (1910); Miller v. Savage, 60 N. J. Eq. 204, 46 Atl. 632 (1900); Pitcher v. Henessey, 48 N. Y. 415 (1872); Bacot v. Fessenden, 130 App. Div. 647, 124 N. Y. Supp. 370 (1910). For an extensive list of cases to same effect see 3 Williston, Contracts, 2803, n. 28.

As a matter of principle there can be no doubt that a mistake of law should have the same effect as a mistake of fact, and the same remedies should be given both at law and in equity, subject to the same limitations. Yet the cases in which the courts have held or stated that no relief will be given for mistakes of law are legion.[60] Probably in the large majority of these cases the result would have been the same if a mistake of fact had been involved rather than a mistake of law because under the facts no relief could be given in any event. In many of the cases the mistake was unilateral, or as to a matter which was purely collateral, in no sense an intrinsic or essential part of the bargain, for which no relief would be given if a like mistake of fact had been made. In many of them, in which the courts have been particularly emphatic in asserting the principle that all are presumed to know the law, the question has involved recovering money paid in settlement of a claim as to which the law was uncertain or in dispute, the question of law having later been settled by subsequent decision. Surely the settlement of such a claim does not involve a warranty or its equivalent by the person receiving such payment that legal liability exists. That question is settled by the payment.[61] Where a correspond-

60 See the long lists of such cases cited in 3 Williston, Contracts, 2798, 2799.

61 Thus in Brisbane v. Dacies, 5 Taunt. 143, 128 Eng. Rep. 641 (1813), payment according to naval custom by a captain in the English navy to his admiral of 1/3rd of the money received by him for carrying treasure could not be recovered by him on later discovering that he was not legally required to make such payment. The mistake was collateral not intrinsic. The court said: "There are many doubtful questions of law. When they arise the defendant has an option either to litigate the question, or to submit to the demand and pay the money." In Doll v. Earle, 59 N. Y. 638 (1874), the difference between the value of the mortgage debt in legal tender notes and coin was held in abeyance awaiting the decree of the U. S. Supreme Court in the Legal Tender Cases. When the court held the act to be void as to prior mortgages such as the one involved, this money was paid to the mortgagee. Later the Legal Tender Act was sustained on a reargument. The court denied the plaintiff's action to recover this money from the mortgagee. Surely payment made according to the law as it stood when made cannot be recovered when the law is changed later by a decision in a later case. To same effect, Kenyon v. Welty, 20 Cal. 637 (1862). In Newburgh Sav. B. v. Woodbury, 173 N. Y. 55, 65 N. E. 858 (1903) bonds of the town of Woodbury purchased by the plaintiff became void because of a de-

ing dispute exists as to a fact, and payment is made in settlement of the controversy, there is no basis for demanding repayment because of mistake of fact.[62] Where the payment is made on the basis of a clear mutual mistake of law, no uncertainty as to the law existing in the minds of the parties, the mistake being the inducing cause of the payment, relief is given as in corresponding cases of intrinsic mistake of fact. Thus where land is partitioned by deed due to a mutual mistake of law as to the title and ownership,[63] or a contract is made to purchase land which really belongs to the purchaser,[64] relief was given in Chancery at an early date. The later cases have taken the same position where the mistake is as to the private right of one of the parties, distinguishing a mistake as to a private right of ownership or the like from a mistake as to a general rule of law, and sometimes regarding the mistake as to a private right as a mistake of fact, or of fact and law combined, though no mistake as to the actual facts on which the private right depended was involved.[65] It seems clear that this exception, like

cision of the Court of Appeals holding that the statute under which they were issued was unconstitutional. The money was paid by the town to men drafted under the Conscription Act in accordance with the statute authorizing the bonds. The court held that while the town of Woodbury would be compelled to return any of this money remaining in its treasury because of lack or failure of consideration, the drafted men could not be compelled to repay it to the plaintiff because they received it under a "mistake of law" only. As these men were not parties to the sale of the bonds to the plaintiff, rescission for mistake was not involved. These cases illustrate how in many instances the courts base their decision on a refusal to relieve from a "mistake of law," when no such question is really involved in the decision.

62 See *supra* notes 24–28.

63 Lansdowne v. Lansdowne, 2 Jac. & W. 205, 37 Eng. Rep. 650 (1730).

64 Bingham v. Bingham, 1 Ves. Sr. 126, 27 Eng. Rep. 934 (1748).

65 In Cooper v. Phibbs, *supra* note 53, the plaintiff was relieved from a lease where he was himself really owner of the property. Lord Westbury's statement that the principle that ignorance of the law excuses no one means ignorance of general law, having no application to a mistake as to a private right, is a mere sophistry if there is no mistake as to the facts on which the private right depends but only a mistake as to the law applying to those facts. Professor Williston says (3 Contracts, 2811): "The only merit of this distinction . . . is that it enables a court of equity to give relief in a majority of cases where the parties to a transaction assumed as a basis for it a certain legal situation." Justice Holmes'

the cases of reformation of writings for mistake as to the legal effect of the writing as executed, really admits the error involved in the general doctrine that mistake of law is not a ground for relief. Relief is given in these cases because the mistake involves an essential matter assumed by both parties as a basis of their contract or other transaction, and whether that matter involves a fact or a legal relationship depending on the law applying to the situation, the same essential unfairness in enforcing a contract or transaction differing radically from what both parties intended is presented whether a mistake of law or of fact is the cause of the difficulty. It would seem to be better for the courts to acknowledge the error, rather than to try to

comment referred to in note 53, *supra,* that a mistake of fact is involved because the inference is the parties are mistaken as to the facts on which ownership depends, does not help because such an inference is a mere guess in the absence of evidence of such mistake of fact, and where it is established that no such mistake exists as to such facts underlying ownership, relief must be given because exactly the same injustice would exist in permitting the transaction to stand contrary to what both parties intended, and the cases so hold, at least in equity. In re Oliver's Settlement [1905], 1 Ch. 191; Mansfield v. Lynch, 59 Conn. 320, 22 Atl. 313 (1890); Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012 (1905); Waggoner v. Waggoner, 111 Va. 325, 68 S. E. 990 (1910). In Mansfield v. Lynch, *supra,* money paid by an administrator in payment of a creditor of the estate in full, induced by mistake of law as to the validity of other debts of the decedent, when the creditor was entitled to only a percentage of his claim on a parity with the other creditors, was recovered to the extent of the excess payment. Compare Beard v. Beard, 25 W. Va. 486 (1885), *contra.* The Connecticut cases seem to have gone the whole way in abolishing all distinction between mistakes of law and fact. Kane v. Moorehouse, 46 Conn. 300 (1878); Monroe Nat. B. v. Catlin, 82 Conn. 227, 73 Atl. 3 (1909); 3 Williston, Contracts, 2799; 3 Cook, Cas. Eq., 420 n. The same result has been reached in Kentucky. McMurtry v. Ky. Cent. R. Co., 84 Ky. 461, 1 S. W. 815 (1886), 3 Cook, Cas. Eq., 422, and other cases cited 3 Williston, *op. cit.* 2799, n. 16. In California the Civil Code, §§ 1567, 1576, 1578, seems to have put mistake of law and fact on the same basis, and similar statutes have been enacted in Georgia, Montana, North Dakota and South Dakota. See citations of statutes, 3 Williston, *op. cit.* 2800.

In Goff v. Gott, 5 Sneed 562 (Tenn. 1858), the plaintiff recovered a horse which he surrendered under mistake of law to the former owner, whose right to recover the horse had been cut off because the plaintiff had acquired it for value and without notice from the fraudulent purchaser. The court speaks of the mistake "as the mixed result of both fact and law," though no suggestion of a mistake as to any fact appears in the case.

avoid its ill results in genuine cases of mistake demanding relief by creating exceptions based on specious reasoning. In Illinois and Pennsylvania, where the courts have refused relief in the reformation cases, they have been equally consistent in maintaining their principle and equally unjust by refusing to make an exception in these cases also.[66]

As the law stands, therefore, the essential error in applying the maxim, "Ignorance of the law is no excuse," to cases of intrinsic mistake of law which makes the transaction materially different from what both parties intended, is tacitly admitted by the cases which reform written instruments because of mistake of law as to their legal effect, and cases of mistake of law as to antecedent rights on the basis of which the parties mutually make the contract or execute the transaction, where equity relieves on the pretense that a mistake of fact is in some unexplained way involved, though really because justice demands relief just as strongly and for exactly the same reason as if the mistake were one of fact. In the large majority of the other cases in which this doctrine is applied, based on the maxim above referred to which has no application to cases of mutual mistake of law preventing true mutual assent, relief for mistake would not be given though the mistake were one of fact because it was collateral and not intrinsic, or it was unilateral and in no way induced by the other party, or was based on existing law subsequently modified by a later decision. There remains, however, a very extensive and miscellaneous mass of decisions, *dicta,* and statements by legal authors tending to support the principle herein criticized, subject to the exceptions above discussed. In several states the law is settled, definitely one way or the other, as explained above. In the majority of the states the law is obscure and indefinite on this question, demanding a clearing up of the situation by the courts.

[66] Thomas v. Chicago, 55 Ill. 403 (1870); Clark v. Lehigh Coal Co., 250 Pa. 304, 95 Atl. 462 (1915). In the latter case the mistake of the tenant as to the landlord's title was apparently unilateral, in no way chargeable to the landlord, and no relief could be had if the mistake were one of fact, as in so many of the cases in which relief is refused because of mistake of law. See Note, Mistake of Law in New York (1922), 22 Col. L. Rev. 166.

In Wisconsin a mistake of law as to an antecedent legal right is not a ground for relief solely because it is a "mistake of law" and irrespective of the injustice involved. Birkhauser v. Schmitt, 45 Wis. 316 (1878).

CHAPTER XXII

MISCELLANEOUS FORMS OF EQUITABLE RELIEF

§ 116. **Bills Quia Timet.** This chapter consists of a brief summary of several equitable actions which do not fall within the chief subdivisions of equity as heretofore treated, including bills *quia timet,* bills to remove a cloud or to quiet title, bills of peace and bills of interpleader. Much of the substance of these forms of relief has been developed incidentally in connection with the foregoing chapters. It is important, however, that each of these special kinds of equitable relief should have a separate and independent treatment.

A bill *quia timet* is allowed in equity to settle a legal controversy between the parties when the plaintiff seeking equitable relief has a valid defense to the defendant's right of action at law, and where for some good reason the setting up of the defense at law may not be adequate to protect him, as where there is danger that his evidence of the defense may be lost before the defendant brings his action to trial, or his defense may be cut off by a transfer of a negotiable instrument to a purchaser for value without notice in cases where the defendant's right of action is based on such an instrument. Equity intervenes by compelling the defendant to litigate the matter at once solely for the reason that the plaintiff's remedy at law is inadequate. Equity is able to compel the defendant to litigate his claim by *in personam* procedure, the lack of which at law makes such relief impossible, and in consequence the defendant has the power at law, by delaying the prosecution of his claim, to subject the defendant to the possible loss of his defense either by the loss of his evidence or by transfer of the negotiable instrument on which the claim is based to a holder in due course. There is no doubt that equitable relief is demanded in the latter case, and it is given as a matter of course, an injunction *pendente lite* against negotiating the instrument being given at

the commencement of the action in equity, and a decree requiring its surrender and cancellation being given at its close.[1]

Where the transfer of a negotiable instrument before maturity is not involved there is greater uncertainty as to the limits of the jurisdiction of equity based on the principle of *quia timet*. or fear of loss of the plaintiff's defense by loss of evidence. Danger through loss of evidence is the basis of equitable relief against a negotiable instrument also where its transfer to a holder in due course will not cut off the defense, as where the instrument is overdue or the defense will not be affected by the transfer, such as forgery and usury. If the instrument, whether negotiable or not, is void on its face the courts hold that there is no occasion for equitable relief.[2] The danger that the fraudulent holder may destroy the instrument, and at a later time after evidence of the defense has been lost, may be able to prove its contents by secondary evidence without disclosing that part of it which made it invalid, does not seem to have occurred to the courts.

By the weight of authority and reason the fact that an action has been started at law is immaterial because the defendant

[1] Smith v. Aykwell, 3 Atk. 566, 26 Eng. Rep. 1126 (1747); Moeckly v. Gorton, 78 Iowa 202, 42 N. W. 648 (1889); Buxton v. Broadway, 45 Conn. 540 (1878), *dictum;* Fuller v. Percival, 126 Mass. 381 (1879), *dictum.* See cases cited 2 Ames, Cas. Eq., 133, n. 2. No injunction will be granted if the instrument is overdue or the defense will not be cut off by such transfer in states refusing *quia timet* relief in such cases. 2 Ames, *ibid.* See note 5, *post.*

[2] Simpson v. Lord Howden, 3 Myl. & Cr. 97, 40 Eng. Rep. 862 (1837), and cases discussed therein. See cases cited 2 Ames, Cas. Eq., 128 n. In Gray v. Mathias, 5 Ves. 286, 31 Eng. Rep. 591 (1800), the court said: "It would be a monstrous hardship, if a man should come here, saying, another person has an instrument good for nothing upon the face of it, that there is nothing of discovery wanting, but stating, that if the instrument is ever produced, it is good for nothing, and a piece of waste paper, yet seeking by a long litigation in this court to have that instrument delivered up." These cases go upon the ground that a mere surrender and cancellation of the instrument is the relief sought, when in fact a final settlement binding as *res adjudicata* would be the result of equitable relief, eliminating the danger of establishing the defendant's action by secondary evidence after the plaintiff's evidence of its invalidity has been lost. The law seems settled in accord with above cases, and *dicta* to the same effect are frequent. See Springport v. Teutonia Sav. B., 75 N. Y. 397, 402 (1878).

may withdraw the suit without the consent of the plaintiff seeking *quia timet* relief.[3] If in any jurisdiction he cannot do this, the defense may be set up as well in that suit as in equity, and equity will give no relief.[4]

The most serious limitation on *quia timet* equitable relief where the danger is merely loss of evidence of the defense arises from the position taken in some of the cases that the bill *quia timet* will be dismissed if the danger may be obviated by perpetuating the testimony in question either by a bill in equity under the old practice or by motion under code practice.[5] The

[3] Buxton v. Broadway, *supra* note 1, the court saying: "The fact of the pendency of the suit at law in the present case, though strenuously urged upon us in the argument, we lay out of our consideration, in view of the fact that it may be withdrawn by the respondent at his pleasure, and another brought at a time when an unconscionable advantage may be taken of the petitioner." In Grand Chute v. Winegar, 15 Wall. (U. S.) 373 (1872) relief was denied because the defense would be as effective in the pending suit at law. In Anthony v. Valentine, 130 Mass. 119 (1881), a demurrer to the bill was sustained because an action on the note was pending at law. See 9 Corpus Juris 1163 for a list of cases on each side of this question.

In McHenry v. Hazard, 45 N. Y. 580 (1871), the court said that the pendency of the action at law on the instrument in question, if only one suit were involved, would bar another action for cancellation in equity, because the merger of law and equity under the Code gave the plaintiff the right to ask as defendant for any equitable relief to which he was entitled in the pending suit brought against him on the instrument. It is clear that in nearly all states he may secure surrender and cancellation of the instrument by equitable counterclaim in the pending action at law, making a separate action unnecessary. The court allowed the equitable action because three different persons were seeking to hold the plaintiff in separate actions as assignees of the instrument, requiring intervention by equity to settle the matter in one suit.

[4] That the plaintiff cannot withdraw his action as a matter of course in the federal courts see Stevens v. The Railroads, 4 Fed. 97 (1880). Professor Clark says, Clark, Equity, 542, n. 1, that this is the explanation of the decision in Grand Chute v. Winegar, *supra* note 3.

[5] In Allerton v. Belden, 49 N. Y. 373 (1872), where the defense to the note was usury and *quia timet* relief was denied the court said: "If he is apprehensive that his witnesses may die, he may perpetuate their testimony under the provisions of the Revised Statutes. If the danger of the death of witnesses were a sufficient ground for an action for relief, every case of usury where the lender has not sued at law may be brought by the borrower into a court of equity." To same effect, Venice v. Woodruff, 62 N. Y. 462 (1875). In Brooking v.

reasons against this position are stated forcefully in Hardy v. Brier, quoted in the preceding note, and the statements from Story and Kent included in that quotation. It is clear, of course, that actions at law cannot be turned into suits in equity eliminating jury trial without the defendant's consent unless strong reasons for equitable intervention exist. But as against a defendant guilty of forgery or fraud who is withholding any action, biding his time until he can make his fraud effective, the plaintiff is in an intolerable position, helpless at law to meet the threat which may continue for years, except by reducing to the form of depositions such evidence as he may have of his

Maudslay, L. R. 38 Ch. Div. 636 (1888), the court refused to cancel an insurance policy for sending the insured vessel to sea in an unseaworthy condition, though admitting that it would be canceled for fraud in its inception. The court said: "It would seem to me the appropriate remedy would be found in an action for the perpetuation of testimony rather than in proceedings such as the present." It is not clear why this argument should not apply equally where the defense to the policy was fraud. There is no distinction between cases of defenses arising before or after execution of the instrument. In each case the *quia timet* element is exactly the same.

In Hardy v. Brier, 91 Ind. 91 (1883), a suit to cancel a forged note was sustained, the court saying: "The right to cancel forged instruments has been fully recognized as belonging to the jurisdiction of the courts of chancery. 1 Story Eq., sections 700 and 701. This right we do not think is superseded or abridged by the statute for taking and preserving evidence for future use. The mere right of a defense at law, when it may suit the pleasure of the holder of a forged note to bring suit, can not be considered as an adequate remedy. The difficulty of anticipating and meeting in advance fabricated evidence that the forger of a note would not likely hesitate to resort to, in order to sustain its pretended validity, at once suggests the incompleteness and unsatisfactory character of an attempt to ultimately defeat such note by preserving evidence for that purpose under the statute.

"Mr. Justice Story in Section 700, *supra*, says: 'If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose.' And in Hamilton v. Cummings, 1 Johns. Ch. 517, . . . Chancellor Kent observes that 'It is immoral for a person to retain a bond which is useless to him, and an annoyance to others.' The enjoyment of a man's possession ought not to be poisoned nor his credit impaired by the probability, or even possibility, that at some future period the payment of a forged note may, under the forms of law, be enforced against his estate. Remedial justice is active rather than passive."

defense, which are bound to be less effective eventually on the trial than parol testimony would be, and unable to use his witnesses in rebuttal of the defendant's evidence. Surely *quia timet* relief is far more effective in such cases than the perpetuation of testimony. An immediate disposition of the matter in equity deprives the defendant of no right but only of a power to do harm by withholding his action. In New York the weight of authority favors the rule that a bill *quia timet* will not lie in these cases where the evidence may be perpetuated, contrary to the position of Chancellor Kent [6] and in Illinois and some other states the law is the same.[7] Nevertheless in many cases in England and the other states *quia timet* relief has been granted irrespective of the right to perpetuate testimony where the only equity arose from the danger that the plaintiff would lose his defense because of the possible loss of evidence due to the defendant's failure to prosecute his claim.[8]

[6] See New York cases *supra* note 5, also additional New York cases cited 2 Ames, Cas. Eq., 114, n. 2. See, however, Hamilton v. Cummings, 1 Johns. Ch. 517, quoted from *supra* note 5, McHenry v. Rowland, 45 N. Y. 580, quoted *supra* note 3, upholding the right to *quia timet* relief against a non-negotiable note procured by fraud as a counterclaim in an action pending on the note, and Springport v. Teutonia Sav. B., 75 N. Y. 397 (1878), where relief was allowed because of the danger of loss of evidence of the defense as well as to avoid multiplicity of suits, the validity of the bonds being established *prima facie* by the certificate of the assessors under the statute, contrary to the situation in Venice v. Woodruff, *supra* note 5. Discretionary power to grant *quia timet* relief in these cases seems not to be shut off altogether in New York.

[7] Vannatta v. Lindley, 198 Ill. 40, 64 N. E. 735 (1902), noted, 16 Harv. L. Rev. 222; Farmington Village v. Sandy River N. Bank, 85 Me. 46, 26 Atl. 965 (1892).

[8] Lovell v. Hicks, 2 Y. & C. Ex. 46, 160 Eng. Rep. 306 (1836); Fenn v. Craig, 3 Y. & C. Ex. 216, 160 Eng. Rep. 680 (1838); Buxton v. Ordway, 45 Conn. 540, *supra* note 1; Fuller v. Percival, 126 Mass. 381 (1879), *supra* note 1; Nathan v. Nathan, 166 Mass. 294, 44 N. E. 221 (1896); Wilson v. Getty, 57 Pa. 266 (1868). See also cases in note 5, *supra*.

Equitable relief compelling the surrender and cancellation of instruments under seal and negotiable instruments for fraud and the like, based on the absence of any relief at law in these cases, not on the *quia timet* principle, has been treated elsewhere. The establishment of this right as an equitable defense or counterclaim in an action on the instrument at law is discussed in the same chapter. See § 21, *ante*. We have seen that this relief in connection with the law action does not make it any the less equitable,

Bills for discovery and to perpetuate testimony developed quite apart from bills *quia timet*. There is no historical basis for the twist by which the modern cases in New York and elsewhere have tied together the two principles. In most states the taking of testimony before trial for whatever reason has become a matter of practice by motion rather than by action, under the Code or other statutes.[9] Since compelling the surrender and cancellation of forged or otherwise invalid instruments, the retention of which by the wrongdoer is a constant threat of danger and annoyance to the plaintiff, is so definitely the right and equitable thing to do, and is so clearly superior to delay which permits the wrongdoer to save his blow until it can be delivered most effectually to accomplish his fraud, we may confidently expect that the entanglement of this action with the perpetuation of testimony will not be permitted generally to stand in the way of this form of relief. A reasonable exercise of judicial discretion in the application of this relief, as suggested by Chancellor Kent,[10] may be relied on to prevent any general transfer of law actions to equity on the ground of delay on the defendant's part in asserting his claim.

§ 117. Bills to Remove Cloud and to Quiet Title. The purpose of these actions is to relieve the plaintiff from invalid claims based on instruments which make his title doubtful and therefore unmarketable where no adequate remedy exists at law to

and that the jurisdiction of equity in these cases is in no way cut down by permitting the setting up of these defenses in law actions. See §§ 19, 21, 23, *ante*. In these cases, where surrender and cancellation is required, a counterclaim is necessary. See § 21, *ante*. *Quia timet* relief is not needed in these cases in which the suit at law is pending except to guard against a possible withdrawal of the action at law, as explained in note 3, *supra*, in discussing McHenry v. Rowland.

9 See Hardy v. Brier, *supra* note 5, and Venice v. Woodruff, *supra* note 6, as to the statutory substitute for the bill to perpetuate testimony.

10 In Hamilton v. Cummings, *supra* note 5. See opinion of Rapallo, J., in Springport v. Teutonia Sav. B., 75 N. Y. 397, 402 (note 6, *supra*): "In cases of this description the propriety of affording equitable relief to a party against prosecution at law, or decreeing the cancellation of instruments rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case, and it is impossible to lay down general rules which shall govern all cases."

correct the situation. A *quia timet* element is involved because the plaintiff has no means of getting the title determined and the cloud removed by an action at law, as he must wait until he is sued by the person with the hostile claim, and the danger of loss of his evidence to overthrow the claim exists as in the cases discussed in the preceding section. That element, however, is immaterial in these cases because whether it be present or absent the plaintiff is entitled to removal of the cloud because it interferes wrongfully with his power to convey his land, destroying its marketability, and the law gives no remedy.[11]

[11] See cases in notes following. In Ashurst v. McKenzie, 92 Ala. 484, 9 So. 262 (1890), the dispute was as to the location of a boundary line, the deeds of the parties were ambiguous in fixing the line, and the plaintiff's purpose was to establish the true boundary. The court held that the only question involved was the settlement of a dispute as to the ownership of the land between the boundaries as claimed by each of the parties, a question to be determined at law, requiring no relief in equity. There was no instrument to cancel or cloud to remove. That removal of a cloud does not necessarily involve cancellation of an instrument of title, see Gilbert v. McCreary, 87 W. Va. 56, 104 S. E. 273 (1920), where the case turned on the interpretation of the description of the land in a will instead of in a deed. The court said: "Removal of a cloud from title does not necessarily involve formal or express cancellation of an instrument. . . . 'A court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties require.'" . . .

See McArthur v. Hood Rubber Co., 221 Mass. 372, discussed § 100, note 25, *ante*, the court decreeing a restrictive covenant to be at an end because of changed conditions in the neighborhood, eliminating it as a cloud on plaintiff's title, though no cancellation of any instrument was involved. Here what had been a valid restriction as a right *in rem* was extinguished by decree operating *in rem*. With the power to act *in rem* now generally established in equity by statute or decision in nearly all the states, and with the decree becoming a part of the record title by *lis pendens* or by being recorded like a deed, the title may be modified directly by the decree.

The right of a plaintiff having an admitted or established title by adverse possession to relief against the former owner out of possession claiming title has been enforced by compelling a conveyance by the former owner to the adverse possessor. See Arrington v. Liscom, 34 Cal. 363 (1868), and Rayner v. Lee, 20 Mich. 384 (1870), Durfee, Cas. Eq., 660, n. 20. In most states a decree declaring the title of the plaintiff valid and the former title of the defendant extinguished, becoming a matter of record to subsequent purchasers under *lis pendens* or other statutes, is the common-sense disposition of the matter without the

It is often said that the plaintiff must be in possession to maintain this bill because if he is out of possession he may settle the conflicting claim by a suit in ejectment where the hostile claimant is in possession.[12] The better way of expressing the principle of these cases, and the rule for which they stand, is that the plaintiff out of possession cannot substitute this action in equity for ejectment at law where ejectment would be an adequate remedy, finally settling the disputed question of title and requiring no further equitable relief. The bill may be brought by a plaintiff out of possession where he cannot maintain ejectment because he is not entitled to possession, as where his interest is that of mortgagee without right of possession, remainderman or reversioner,[13] or where ejectment is impossible.[14] Statutory changes are referred to hereafter.[15] It is clear, also, that where cancellation of an instrument as a matter of record is required in addition to ejectment, which relief a court of law cannot give, the bill in equity giving full relief will lie though ejectment could be maintained by the plaintiff.[16]

travesty of compelling the former owner to convey his extinguished title to the wrongdoer who has acquired a superior title by adverse possession. The court made a declaratory decree to that effect, with an injunction against the defendant, in Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720 (1892). See cases in accord with Arrington v. Liscom, *supra*, cited in 2 Ames, Cas. Eq., 144, n. 1. See, also, Walker v. Converse, 148 Ill. 622, 36 N. E. 202 (1893); Tourtelotte v. Pierce, 27 Nebr. 57, 42 N. W. 915 (1889).

12 Frost v. Spitley, 121 U. S. 359, 7 Sup. Ct. 1129 (1887); Johnson v. Huling, 127 Ill. 14, 18 N. E. 786 (1888); Chandler v. Graham, 123 Mich. 327, 82 N. W. 814 (1900); Keane v. Kyne, 66 Mo. 216 (1877); Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401 (1886). See list of cases cited, 2 Ames, Cas. Eq., 145, n. 3. Statutory modifications settling disputed title irrespective of possession by either party are discussed in notes 30, 31, *post*.

13 Worthington v. Miller, 134 Ala. 420, 32 So. 748 (1901); Horn v. Garry, 49 Wis. 464, 5 N. W. 897 (1880). A grantor liable for the defect under a warranty of title, though out of possession, has an interest which entitles him to relief. Remer v. Mackay, 35 Fed. 86 (1888); Begole v. Hershey, 86 Mich. 130, 48 N. W. 790 (1891); Pier v. Fond du Lac, 53 Wis. 421, 10 N. W. 686 (1881), and other cases cited, 2 Ames, Cas. Eq., 146, n. 3.

14 Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495 (1884); Johnson v. Huling, *supra* note 12; O'Brien v. Kreitz, 10 Kan. 202 (1872); Tabor v. Cook, 15 Mich. 322 (1867); Pier v. Fond du Lac, *supra* note 13; 2 Ames, Cas. Eq., 146; (1910) 10 Col. L. Rev. 671.

15 See notes 30, 31, *post*.

16 Hamilton v. Batlin, 8 Minn. 403 (1862); Kruczinske v. Newen-

If the instrument actually does not cloud the title in that it cannot create any doubt as to the validity thereof, the bill to remove cloud will be dismissed. A deed, mortgage or other instrument executed by a stranger to the title out of possession is not a cloud. It is a nullity on its face, misleading no one.[17] If the person executing the instrument is in possession, creating a *prima facie* case of title, relief will be given because the instrument might cast doubts on the plaintiff's title. It is generally held that an instrument void on its face is not a cloud which equity will remove [18] and that where proof of the defendant's claim will necessarily result in establishing its invalidity equity will not interfere.[19] If any real doubt is cast upon the plaintiff's

dorf, 99 Wis. 264, 270, 74 N. W. 974 (1898). Actions to cancel of record mortgages which have been paid or are void for usury are familiar illustrations. Though in the usual case the mortgagor is in possession, there can be no doubt that the same reason exists for cancellation where he recovers possession by ejectment against the mortgagee in possession. In code states this relief will, of course, be given in connection with the ejectment suit under code merger of law and equity.

17 Pixley v. Huggins, 15 Cal. 127 (1860). ["A conveyance not fall-in in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance . . . any more than upon so much waste paper."] Bothin v. Cal. Title Ins. Co., 153 Cal. 718, 96 Pac. 500 (1908); Nickerson v. Loud, 115 Mass. 94 (1874); Hannibal etc. R. Co. v. Nortoni, 154 Mo. 142, 55 S. W. 220 (1900); Ward v. Dewey, 16 N. Y. 519 (1858); Farnham v. Campbell, 34 N. Y. 480 (1866).

18 See cases *supra* note 17, also Alden v. Trubee, 44 Conn. 455 (1877); Glos v. Furman, 164 Ill. 585, 45 N. E. 1019 (1897). In Scott v. Onderdonk, 14 N. Y. 9 (1856), the court said: "If, however, the claim is based upon a written instrument which is void upon its face, or which does not in its terms apply to the property it is claimed to affect, there seems to be no reason for entertaining a litigation respecting it, before it is attempted to be enforced; for the party apprehending danger has his defense always at hand." It is clear that the court had in mind *quia timet* relief based on possible loss of evidence, not the removal of interference with the marketability of the plaintiff's property.

19 In Scott v. Onderdonk, *supra* note 18, relief was given against proceedings to sell land in the enforcement of a municipal assessment where no assessment had been made against the land, for the sole reason that the statute under which the sale was to be made provided that the deed should be *prima facie* evidence of the facts therein recited. If the purchaser at such sale would be required to prove a valid assessment in establishing his title,

title, relief is given in most of the cases in spite of statements of this kind. Cases of the latter class involve the application of the *quia timet* principle, which is really immaterial as the true purpose of equitable relief in these cases is to end unjustified interference with the power to sell and convey the land. It is clear that the existence of a claim of title which in fact is sufficient to make the plaintiff's title doubtful from the standpoint of the average purchaser of the land just as effectually interferes with the land's marketability whether or not the invalidity of the claim will necessarily be established by proof of the claim, a situation which will continue indefinitely while the claim remains unenforced, requiring affirmative relief canceling or otherwise removing it.[20] A levy or assessment against the land under a judgment or proceeding against a stranger is treated as a threatened cloud and will be enjoined.[21] In any case in which the pro-

its invalidity would be disclosed on any attempt to enforce it, and no relief would be required. In Washburn v. Burnham, 63 N. Y. 132 (1875), cancellation of a recorded contract for the sale of land was refused because the invalidity of the contract, arising from the fact that the attorneys who signed it in behalf of the principal did so without authority, would necessarily be disclosed on proof of the contract in any action to enforce it.

20 In Pixley v. Huggins, *supra* note 17, the court enjoined a sale under execution levied some time after the property had been conveyed by the judgment debtor to the plaintiff, because the threatened conveyance would be a cloud on the title, creating doubt as to the validity of the conveyance from the judgment debtor to the plaintiff, awakening suspicions of concealed defects, "and must thus tend to depreciate the value of the property in the market, and to embarrass the owner in its sale or use as security." The court gives this test of a cloud: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery?" See O'Hare v. Downing, 130 Mass. 16 (1880), and several other cases cited 2 Ames, Cas. Eq., 155, n. 4, *accord*. The question of proof of the invalidity of the hostile title should be treated as immaterial except as it tends to show that some question may reasonably exist as to its validity, creating doubt as to the plaintiff's title. Any test turning on evidence of the opposing title on its enforcement at some future time misses entirely the point, which is wrongful interference with the marketability of the land.

A prior unrecorded deed, void as against a subsequent recorded deed from the same grantor, will be canceled as a cloud, based on the same reasoning as in Pixley v. Huggins. Hodgen v. Guttery, 58 Ill. 431 (1871), 2 Ames, Cas. Eq., 155, n. 4.

21 Bishop v. Moorman, 98 Ind. 1 (1884), 2 Ames, Cas. Eq., 156;

ceeding will result in a cloud which equity will remove, an injunction preventing the cloud will be granted as a matter of course.[22] "An assertion of a right to seize land, when made under color of official authority, clouds title, and it has always been a well-recognized equity doctrine that injunction will lie to prevent clouds from being cast upon an owner's title."[23] As a matter of logic it is true that the conveyance by the sheriff in such case is just as void as a deed executed by a stranger, since he purports to convey only the interest of the judgment debtor who is a stranger, but an official act of this kind might well create doubt of the plaintiff's title in the mind of the average purchaser, and therefore an injunction or cancellation, as the case may be, is required to prevent this wrong. The New York cases to the contrary are based on the principle of *quia timet*, disregarding the wrong arising from interference with the marketable quality of the plaintiff's land, which must be taken as the only genuine basis for relief in these cases.[24] Based on the reasoning of the cases granting relief against such void execution sales the courts of many states, sometimes aided by statute, have held in other situations generally that if the opposing claim does, in fact, render the property unmarketable, relief will be granted though the claim is void on its face, or its invalidity will be necessarily disclosed on investigation or on an attempt to enforce it.[25] This result is necessary if the confusion with *quia timet* cases is eliminated and the court is satisfied that the title is rendered unmarketable as a matter of fact, irrespective of the ease or difficulty of establishing the invalidity of the opposing claim.

Some of the more usual cases of removable clouds on title in addition to those discussed above are deeds or mortgages procured by fraud,[26] or based on an illegal consideration such as

Hickman v. O'Neil, 10 Cal. 292 (1858); Glos v. Furman, 164 Ill. 585, *supra* note 18; Key City Co. v. Munsell, 19 Iowa 305 (1865); Vogler v. Montgomery, 54 Mo. 577 (1874).

22 See cases in preceding note; also Pixley v. Huggins, *supra* note 20; Scott v. Onderdonk, *supra* note 18.

23 From opinion in Bishop v. Moorman, *supra* note 21.

24 Marsh v. Brooklyn, 59 N. Y. 280 (1874); Scott v. Onderdonk, *supra* note 18; Washburn v. Burnham, *supra* note 20, and cases cited therein.

25 See cases cited 2 Ames, Cas. Eq., 158, n. 13.

26 Martin v. Graves, 87 Mass. (5

usurious mortgages;[27] deeds executed by an agent after his authority has ended;[28] and deeds void because of the failure of the grantee to perform conditions precedent.[29]

The broadening of the remedy to remove cloud on title has been to a considerable degree due to statutes in many of the states enacted for the purpose of avoiding the technical requirements imposed by the cases and the failure of relief due to the confusing of the remedy with the *quia timet* principle. The Indiana Statute is representative of the most liberal group of statutes of this kind, permitting an action to quiet title by any person, whether in or out of possession, having a present or future estate in the land, against any other person who claims an adverse title or interest whether the adverse claimant is in possession or not.[30] The statutes generally provide that the owner in possession may maintain the action to determine any question of disputed title as against a hostile claimant, whether such claimant is in possession or not.[31] These statutes in no way prevent maintenance of the action by a plaintiff out of possession where equity regularly gives relief, nor do they cut down the granting of the regular equitable relief in these cases.[32]

Allen) 601 (1863); Lupton v. Cornell, 4 Johns. Ch. 263 (N. Y. 1820); Sherrin v. Flinn, 155 Ind. 422, 58 N. E. 549 (1900); Spear v. Spear, 97 Me. 498, 54 Atl. 1106 (1903).

27 Buckingham v. Corning, 91 N. Y. 525 (1883).

28 Saltmarsh v. Smith, 32 Ala. 404 (1858). Compare Washburn v. Burnham, *supra* note 18.

29 Borst v. Simpson, 90 Ala. 373, 7 So. 814 (1890); Adams v. Guyandotte Valley R. Co., 64 W. Va. 181, 61 S. E. 341 (1908).

30 2 R. S. (Ind.) 1852, p. 168. The Indiana cases above discussed have developed the equitable remedy on broad lines, treating the statute as liberalizing the action rather than as creating new actions. See Wilson v. Wilson, 124 Ind. 472, 24 N. E. 974 (1890), in which a general allegation that the defendants asserted an unfounded title was held to be sufficient. Under similar statutes it is generally held that the plaintiff must plead the facts showing the nature of the defendant's claim of title or interest. Douglass v. Nuzum, 16 Kan. 515 (1876); McDonald v. Early, 15 Neb. 63, 17 N. W. 257 (1883).

31 See the following cases applying such statutes: Denny v. Ashley, 12 Colo. 165, 20 Pac. 321 (1889); Newark M. E. Church v. Clark, 41 Mich. 730 (1879); Albro v. Dayton, 50 N. J. Eq. 574, 25 Atl. 937 (1893); O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004 (1895), and cases in note 30, *supra*, also in notes 32 and 33, *post*.

32 Hamilton v. Batlin, 8 Minn. 403 (1862); Hudson v. Wright, 204 Mo. 412, 103 S. W. 8 (1907); McGrath v. Norcross, 71 N. J. Eq. 763, 65 Atl. 998 (1907).

The right to trial by jury cannot be taken from a defendant who is in possession by a substitution under the statute of a suit in equity for an action of ejectment at law.[33]

§ 118. Bills of Peace. These actions in equity are brought for the purpose of making one suit in equity take the place of many suits at law. Cases of injunction restraining repeated or continuous trespasses or continuing nuisances, discussed in preceding chapters, are the most usual and important instances.[34] The jurisdiction of equity arises from the fact that the relief at law is limited to repeated suits for damages as such damages accrue and is therefore inadequate as compared with specific relief in equity which removes all occasion for such suits by ending the wrong by injunction, settling the entire matter by a single action, incidentally permitting the recovery of damages which have accrued up to the time of the trial in order to save the additional action at law which otherwise would be necessary.

In all such cases, if the defendant in such threatened actions at law comes into equity pleading and establishing that he has defended one of these actions on the merits at law, he will be granted an injunction against the defendant who as plaintiff at law threatens him with repeated actions turning on the same questions of law and fact. Having established his right at law by successfully maintaining his defense, coming into equity *qua* defendant, equity gives him peace by enjoining further actions against him by the defendant for damages arising from acts which he has established to be within his rights. Until modern times, because of the fictions and fictitious parties in ejectment, repeated actions in ejectment could be brought by one party against the other, the fictitious plaintiff-tenant, Doe, being regarded at law as a different person for each suit.[35] This travesty was eventually relieved against by a bill of peace in equity, the plaintiff in equity establishing that he had succeeded

33 Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276 (1891); Newman v. Duane, 89 Cal. 597 (1891); Stockton v. Williams, Walk Ch. 120 (Mich. 1843); Chandler v. Graham, 123 Mich. 327, 82 N. W. 814 (1900); 2 Ames, Cas. Eq., 145, n.

34 See Chapters VI and VII, *ante*.

35 Walsh, Hist. Eng. & Amer. Law, 138–142.

in several such suits at law, equity therefore enjoining the defendant from bringing any further suits.[36] Finally it was held that if he established his right by success in two such actions of ejectment the injunction would be granted in his favor.[37] As the judgment in ejectment at law is now *res adjudicata* of the controversy, subject to a right by statute in some states to bring a second action, there is no longer any occasion for bills of peace in ejectment cases.[38] Some confusion has been caused by treating these actions as bills to quiet title when in truth they were simply and only bills of peace.

Greater difficulty has arisen in determining the principles and limitations on which bills of peace will be granted where many suits at law by many plaintiffs are brought or threatened against a defendant who seeks relief in equity, or where a plaintiff in many suits at law against many defendants seeks by a bill of peace to bring in all the defendants and settle the entire controversy in a single suit, in each case it appearing that the same questions of law and fact are involved in all the actions at law which are sought to be disposed of in a single action in equity.

36 As to the slowness of equity to interfere in these cases see Sedgwick & Wait, Ejectment, § 46, Earl of Bath v. Sherwin, Prec. in Chan. 261, 24 Eng. Rep. 126 (1706).

37 Leighton v. Leighton, 1 P. Wms. 672, 24 Eng. Rep. 563 (1720); Marsh v. Reed, 10 Oh. 347 (1841); Pratt v. Kendig, 128 Ill. 293 (1889); Holland v. Challen, 110 U. S. 15, 19, 3 Sup. Ct. 495 (1883). A prior decree in equity finally deciding the controversy, is as effective as a verdict and judgment at law. Pratt v. Kendig, *supra*. If the defendant has repeatedly brought and abandoned suits in bad faith equity has intervened, though no verdict or judgment at law had been won by the plaintiff. Kearns v. Kearns, 107 Pa. 575 (1889). See Shevalier v. Stephenson, 92 Neb. 675, 139 N. W. 233 (1912), in which a suit to contest a will was enjoined after suits had been started and withdrawn by the party enjoined.

38 Gray v. Coan, 36 Iowa 296 (1873).

In actions other than ejectment one successful verdict for the defendant suing in equity to restrain further suits is all that is required, it appearing, of course, that the judgment is not *res adjudicata* as to the threatened subsequent actions against the plaintiff based on subsequent assertion of his right established in the first action. See cases sited 2 Ames, Cas. Eq., 97, n. In Eldridge v. Hill, 2 Johns. Ch. 281 (1816), plaintiff was denied an injunction to restrain successive suits started against him by the defendant for diverting a stream because he had not successfully defended one of these actions at law.

Many of the cases in which this matter has been discussed are cases of joinder of parties, in which several bills of peace or other actions in equity have been consolidated into a single action by joining the different parties and consolidating the different actions, where the questions of law and fact involved were the same, and a single decree would finally and fairly settle the controversy as to all the parties so joined. Thus riparian owners may join as plaintiffs in an action to restrain the defendant from an unlawful use of the stream above them.[39] Each has an action against the defendant, a bill of peace for an injunction in order to prevent the many successive actions at law for damages, and these actions are consolidated because turning on the same questions of law and fact. If they seek damages, however, which would have to be determined separately as to each, there could be no joinder.[40]

The early cases in which bills of peace originated did not involve this doctrine of consolidation of individual bills of peace, because injunctions against repeated or continuous trespasses or nuisance did not develop until early in the nineteenth century.[41] In How v. Tenants, etc.,[42] the conflicting rights of the lord and his tenants, involving their right of common, turned on the same questions of law and fact, and the action in equity was sustained as a bill of peace to avoid the many suits between the lord and his tenants which would be necessary at law. In this and similar early cases prior to the development of relief by injunction against trespass and nuisance early in the nineteenth century no bill of peace would lie against each defend-

[39] Stroebel v. Kerr Salt Works, 164 N. Y. 303, 58 N. E. 142 (1900). A similar right exists in a single riparian owner to join as defendants many persons or corporations who are contributing to the diversion or pollution of the stream of which he complains. See § 35 (1), notes 37, 38, *ante*.

For other illustrations of joinder of many suits in equity into one suit see 2 Ames, Cas. Eq., 63, n., cases in which the plaintiff seeks injunction only against many where combined result of their independent action is a tort, and *ibid.* 66, n. where several parties combine in a single suit against defendant who is committing a tort common to all of them.

[40] See cases cited, 2 Ames, *op. cit.* 66, n.

[41] See §§ 28 and 34, *ante*.

[42] 1 Vern. 22, 23 Eng. Rep. 277 (1681). For other similar early cases see 2 Ames, Cas. Eq., 55, n., involving suits by many tenants against the lord as well as by the lord against many tenants.

ant, and relief was given solely to prevent the many suits which otherwise would be required at law between the parties, turning on the same questions of law and fact.[43] The principle was established by these cases, therefore, that equity will intervene by bill of peace to settle finally a controversy between a plaintiff and many defendants, or between many plaintiffs and a single defendant, where many suits at law would be necessary, but turning on the same questions of law and fact which may be finally disposed of by a single trial and settled by a single decree as to all. Relief by a single action is better than by the many actions at law because of the great saving of expense and trouble to the plaintiff having many rights of action at law against the defendants, or having a defense as against many actual or threatened actions at law against him. It is also of equal relative advantage to many plaintiffs joining in a bill of peace against a defendant in which they combine their several actions into a single action, as the cost to each is correspondingly reduced.

Most of the modern cases in which a single suit for an injunction takes the place of many suits are of the kind discussed above, in which the single plaintiff could get an injunction against each defendant individually, and where the many plaintiffs could each get an injunction against the single defendant, and as the same questions of law and fact are involved, these different suits are consolidated into a single action, one bill of peace in equity taking the place of many bills of peace in equity. The action by a lower riparian owner against many upper riparian owners for polluting the stream, or by many riparian owners against a single upper owner for a pollution violating the rights of all the plaintiffs in the stream, are the best illustrations of these cases.[44] Even though cases are found where the combined acts of several persons constitute a tort, though the act of each person would not give an action either at law or in equity, the suit in equity against all of them lies as a bill of peace because of the continuing nature of the wrong, taking the place of successive actions at law against all of them together or separately for damages as they would accrue, the need of

43 See Chapters VI and VII, ante.

44 See *supra* notes 39 and 40.

which is eliminated by enjoining the tort.[45] But where there is a completed tort for which damages may be recovered at law, and no threat of a repeated or continued tort requiring successive actions, equity will not act merely for the purpose of saving many suits at law as against tort-feasors who are independently liable and who must be sued separately at law, though liability as to each may turn on the same questions of law and fact. In a leading case[46] a railroad company sued to restrain many suits

[45] Thorp v. Brumfitt, L. R. 8 Ch. App. 650 (1873) and other cases discussed *supra* Ch. VII, note 53.

[46] Tribette v. Ill. Cent. R. Co., 70 Miss. 182 (1892). The court refers to the case of a railroad accident in which many persons are injured, liability turning on the same questions of law and fact, involving persons residing in different counties or states having separate and distinct rights of action triable in different courts, with greatly varying claims as involving the same principles. The jurisdiction of equity to settle in a single action a number of claims at law turning on the same questions of law and fact where full relief may be given by an injunction or other decree common to all is entirely reasonable, but it is of very limited application, and can never apply to such cases as those above referred to in which a separate and distinct disposition must be made of each claim sought to be joined. Equity will interfere with the regular legal relief including trial by jury only where equitable relief will be definitely superior in its results, not where it will do harm and be of no real advantage. In Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 So. 274 (1911), Durfee, Cas. Eq., 631, the plaintiff sought by a bill of peace to settle in one suit its liability to the personal representatives of 110 persons who were killed in an explosion in a mine in which they were employed. The question of liability in each case was the same. In reversing its position on a former appeal and denying relief, the court said: "Suppose the equity of the bill should be sustained and the parties proceed to trial, and the complainant fail, then the parties plaintiff, after a delay of many years, will have to be remitted to courts of law to try each of these cases separately. Or, if the complainant succeeded, still there must be 110 trials in the court of chancery, not only as to the liability vel non, as to each of the persons killed, but as to the amount of damages recoverable in each case. If the complainant is liable under the employer's liability act, the amount for which it is liable would be different in each of the 110 cases, depending upon the earning capacity of each decedent. . . . Contemplate 110 separate answers, and as many pleas and demurrers in one suit, and the innumerable issues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys . . . a worse confusion could scarcely be imaginable."

In Montgomery Light & Power Co. v. Charles, 258 Fed. 723 (1919), the U. S. District Court (Ala.) allowed the interpleading of 130 different parties who had separate ac-

brought to recover damages done to property by sparks from the plaintiff's locomotive, asking that all such parties be brought in and their claims determined in a single action to avoid multiplicity of suits because all their claims turned on the same questions of law and fact. The court refused the relief sought. Each defendant had a separate and distinct right of action with the right to appear by counsel, introduce witnesses and cross-examine opposing witnesses. The damages of each would have to be determined separately. No possible advantage would be gained by consolidating these actions, as each would have to be tried in any event, and a great deal of confusion and harm to the claimants would be inevitable. Even in the cases in which actions in equity are joined involving the same questions of law and fact, joinder is impossible if separate damages or compensation is sought requiring separate trial of each claim.[47]

The general rule is that an individual taxpayer cannot get an injunction restraining the collection of an illegal tax or assessment the remedy at law, viz., to recover the tax after payment, being regarded as adequate. Where it will cause a cloud on title to land, or other sufficient equitable grounds exist for interference in addition to illegality, relief will be given, and different parties similarly situated may join in a single action as in other cases involving mere joinder of equity actions discussed above.[48] The question of whether a bill of peace will lie or not is directly

tions to recover damages against plaintiff company for flooding their land, based on Pomeroy's statement of the law, but with little consideration of the difficulties involved.

An attempt to hold a group of stockholders liable in a single action for debts of the corporation for which they were individually liable was defeated in Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244 (1902), though proof of their liability would be the same as to each, because each might have separate and distinct defenses requiring a separate trial as to each. "Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

47 See *supra* note 40.

48 Professor Ames has assembled the cases on these points in a note, 2 Cas. Eq. 72, 73. Of course, no bill of peace is involved in these cases.

involved where taxpayers join in an action for themselves and all others affected to restrain the enforcement of an illegal tax or assessment. The courts have held that the action will lie as a bill of peace, an injunction restraining the admittedly illegal tax eliminating the need of the many suits which the individual taxpayers would have to bring in order to recover the tax after paying it, the only legal remedy.[49] These cases come squarely within the principle of the early actions before individual bills of peace could be brought to restrain trespass or nuisance so that joinder of such suits was not involved in those cases. The same trial and a single decree common to all settles the controversy in a single action without added difficulty or inconvenience arising from the number of the parties, so obviously superior to relief at law involving a great number of suits to recover the tax after payment with all the expense and annoyance involved to a great many people, that it is difficult to see how these cases can be questioned. A Connecticut case holding *contra* argues that each litigant is not affected by multiplicity of suits because each is required to maintain only one suit.[50] The fallacy of this is clear when we appreciate the fact that the cost of the action is divided among all the parties, so that the saving is the same relatively as in any other case where a single action takes the place of many.

In a leading New York case[51] the plaintiff, an attaching creditor, was allowed to bring in some fifty parties who had started replevin suits to recover the same goods from the debtor, claiming the right to rescind for the debtor's fraud and to recover the goods as theirs. This involved the combination of some

[49] McTwiggan v. Hunter, 18 R. I. 776, 30 Atl. 962 (1895); Carlton v. Newman, 77 Me. 108, 1 Atl. 194 (1885); West. Un. Tel. Co. v. Andrews, 216 U. S. 165 (1910), [restraining collection of penalties in 17 counties for nonpayment of void taxes]; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907 (1898).

[50] Dodd v. Hartford, 25 Conn. 232 (1856). Where a great many false claims are being made against a party by many persons, all turning on the same questions of law and fact, so that a single trial and a decree applying in common to all will dispose of the controversy, all such parties may be brought into equity so that the whole matter may be disposed of in a single action. Ill. Cent. R. Co. v. Baker, 155 Ky. 512, 159 S. W. 1169 (1913); Jordan v. West. Union Tel. Co., 69 Kan. 140, 143, 76 Pac. 396 (1904).

[51] Nat. Park Bank v. Goddard, 131 N. Y. 494, 30 N. E. 566 (1892) affirming s. c. 62 Hun. 31 (1891).

fifty distinct actions, involving all the confusion that must necessarily arise in such a situation. It is clear that these fifty defendants could not have joined in a single action against the sheriff who held the goods under the plaintiff's attachment. The plaintiff came in *qua* defendant, and he had not successfully defended one of these suits. They did not turn on the same questions of law and fact. The case presents a perfect example of a situation in which every requirement of a bill of peace was lacking.

In several cases where the plaintiff has or claims to have a valid defense to many actions of the same kind turning on the same questions of law and fact, as actions to enforce penalties under a statute claimed to be unconstitutional, the courts have enjoined all the actions but one until that suit be finally determined, so as to settle the validity of the common defense.[52] This is not a bill of peace, as the issues are not tried in equity. It is an attempt by equitable interference to make one action at law take the place of many actions. The only advantage seems to be to save such incidental expense and trouble as might be involved in the other suits during the time intervening until the first case is tried. If the defense is established as a matter of law the other suits would be withdrawn in any event; if the defense fails the other suits go on, after a delay for which there is an exceedingly shallow excuse.

§ 119. Interpleader. The equity involved in a bill of interpleader is to relieve a stakeholder without any substantial interest in a thing or claim from the burden of defending two or more suits for its recovery from him, when the real controversy is between the opposing claimants, the plaintiff standing ready to turn over the thing or pay the debt or other claim to the person who may prove to be entitled to it. By the bill he brings in the adverse claimants who must fight out the issue

[52] Third Ave. R. R. Co. v. N. Y. City, 54 N. Y. 159 (1873); Norfolk etc. Hosiery Co. v. Arnold, 143 N. Y. 265, 38 N. E. 271 (1894).

The common sense attitude on this point was taken in Boise etc. Water Co. v. Boise City, 213 U. S. 276, 29 Supt. Ct. 426 (1908), the court denying an injunction because there was no reason to believe that another suit would be brought after the question at issue was determined in the first action. The bringing of groundless suits thereafter no doubt would be enjoined if necessary. See cases discussed in note 50, *supra*.

between themselves. After interpleader is allowed and the rival claimants are brought in, the plaintiff ceases to have any connection with the action, so that he is not entitled to be heard in the action thereafter, and his death thereafter will have no effect on the action.[53]

To maintain interpleader he must be a true stakeholder. If he has an interest in the controversy and its result, or if he takes sides as between the parties, interpleader will not be allowed.[54] He must file an affidavit with his bill "that he does not exhibit his bill by fraud or collusion with any of the claimants, but spontaneously for his own security."[55] It has been held that interpleader will not lie if it is not certain that any of the claimants is entitled, as in the case of several persons claiming an advertised reward,[56] but the better view and the weight of authority is that interpleader will lie in such cases though "privity" hereafter discussed is lacking.[57] Where an action by one of the parties against the plaintiff will settle the claim of the other, interpleader cannot be had, as he is subjected to only one suit.[58]

53 Anonymous, 1 Vern. 351, 23 Eng. Rep. 516 (1685); St. Louis Life Ins. Co. v. Alliance Mutual etc. Co., 23 Minn. 7 (1876); Supreme Council v. Bennett, 47 N. J. Eq. 39, 19 Atl. 785 (1890); 2 Ames, Cas. Eq. 2.

54 Where he claims an interest in the *res*, as a share in the fund, or commissions, interpleader is denied. Long v. Baker, 85 Ill. 431 (1877); Ladd v. Chase, 155 Mass. 417, 29 N. E. 637 (1892). In Mitchell v. Hayne, 2 Sim. & Stu. 63, 57 Eng. Rep. 268 (1824), an auctioneer was denied interpleader as between a purchaser and vendor as to the deposit on the sale, as he claimed the right to withhold therefrom a substantial part of the amount. See cases, accord, 2 Ames, Cas. Eq., 13, n. But see notes 58, 75 and 80, *post*.

55 From opinion in Farley v. Blood, 30 N. H. 354 (1854), 2 Ames, Cas. Eq., 4. See list of cases on requirement of affidavit of no collusion, 2 Ames, Cas. Eq., 5, n. 1, including Crane v. McDonald, 118 N. Y. 648, 654, 23 N. E. 991 (1890).

56 Collis v. Lee, 1 Hodges 204 (1835).

57 Referring to this situation the court said in Fargo v. Arthur, 43 How. Pr. 193 (N. Y. 1872): "A case like this is peculiarly proper for an interpleader. . . . Some of the defendants claim the whole; some claim an equitable distribution. It is evidently a case in which the matter should be adjusted in one suit, and in which the plaintiffs do not know to whom they ought to pay the money." See Burritt v. Press Co., 19 App. Div. 609, 46 N. Y. Supp. 295 (1897), 25 App. Div. 141, 49 N. Y. Supp. 201 (1898), and other cases cited Ames, *loc. cit.* 4 n.

58 As in Fitts v. Shaw, 22 R. I. 17, 46 Atl. 42 (1900), 2 Ames, Cas. Eq.,

The plaintiff must deposit in court the thing, or the money in case of a debt or other demand, which is the subject-matter of the dispute, his interest in it ceasing when the interpleader is allowed and the opposing parties are brought in to determine their controversy as to the *res*.[59]

A person in possession of land cannot interplead two hostile claimants to the land, as he can dispose of the matter by quitting the possession.[60] A tenant may interplead two hostile claimants of the rent, as where the landlord assigns the rent and he and his assignee both demand it of the tenant, or where the landlord dies and there is a dispute as to whom the rent is payable.[61] A tenant who is threatened with eviction by a third

7, where conflicting claims to trunks of the testatrix were involved, a single suit settling the controversy. See Long v. Barker, 85 Ill. 431 (1877); Grant Bros. Co. v. Cotter, 181 Mich. 521, 126 N. W. 839 (1910). In such cases the plaintiff has an interest and is subject to a possible liability. He will be allowed to interplead where the controversy is in no sense his, even though a single suit would settle the matter. He is not required to litigate in behalf of others. See *post* notes 75, 80. If the opposing claims are both in equity no interpleader is required, as all parties involved may be joined in a single action in equity to finally settle the matter. Kingsbury v. Andrews, 119 Ill. App. 35 (1905); Badeau v. Rogers, 2 Paige 209 (N. Y. 1830); Lane v. N. Y. Life Ins. Co., 56 Hun. 92 (N. Y. 1900).

59 Gardiner Inst. v. Emerson, 91 Me. 535, 40 Atl. 551 (1898); Crane v. McDonald, 118 N. Y. 648, 654, 23 N. E. 991 (1890). See cases cited under this section generally, as this requirement is involved in every case of interpleader. That there can be no interpleader when the plaintiff has surrendered the *res* to one of the defendants, or has otherwise lost control of it, see 2 Ames, Cas. Eq., 134, n.

60 Metcalf v. Hervey, 1 Ves. 248, 27 Eng. Rep. 1011 (1749).

61 Interpleader as to conflicting claims to specific rents is one only of the many situations in which a debtor or obligor interpleads the original creditor or obligee and another claiming as his assignee or otherwise through him, or two or more claimants claiming through him but in hostility to each other. These are typical cases of interpleader, the creditor acknowledging his debt, depositing the amount in court, and the opposing claimants brought into equity to fight out their legal dispute so as to relieve the plaintiff from the burden of unfair litigation in which he has no interest. Cowtan v. Williams, 9 Ves. 107, 32 Eng. Rep. 542 (1803); Jew v. Wood, Cr. & Phil. 185, 41 Eng. Rep. 461 (1841); Wilmer v. Philadelphia etc. Co., 124 Md. 599, 93 Atl. 157 (1915); and long list of cases cited 2 Ames, Cas. Eq., 8, 9, n. 3. If the stakeholder admits the full amount claimed by one of the parties, it is no objection to interpleader that the others claim only

person having a superior title could not interplead the landlord and the stranger as to the rent. The landlord's claim is to the rent and that of the stranger is to mesne profits, so that the parties do not claim the same thing.[62] In New York and elsewhere the tendency is to hold that the tenant may interplead the parties in this situation today, as each is claiming what is substantially the same thing.[63] Otherwise, if the stranger establishes his title by ousting the tenant in ejectment he recovers mesne profits in tort, which consists principally of the reasonable value of the use and occupation. The tenant has no defense to his landlord's action for rent accruing before such ouster. After paying the rent, if he is ousted and forced to pay mesne profits, he may include the amount so paid as part of his damages in the action against his landlord for breach of the covenant of quiet enjoyment.[64] It is clear, however, that interpleader should be allowed in this case, as it is very unfair that the tenant, who is willing to pay whoever is entitled, should be subjected to this double vexation and liability involving what is practically the same thing, because of the technical difference between rent and mesne profits, and under the modern cases the tendency is to hold that the tenant may interplead the other two.[65]

a part of this amount. By depositing the full amount and interpleading, the plaintiff gets rid of the whole matter. Roselle v. Bank, 119 Mo. 84, 24 S. W. 744 (1893); Packard v. Stevens, 58 N. J. Eq. 489, 46 Atl. 250 (1899); Van Zandt v. Van Zandt, 17 N. Y. Civ. Pr. 448, and other cases cited 2 Ames, *ibid.*

62 Johnson v. Atkinson, 3 Anstr. 798, 145 Eng. Rep. 1043; Fairbanks v. Belknap, 135 Mass. 179, 184 (1883); Dodd v. Bellows, 29 N. J. Eq. 127 (1878). See cases cited, 2 Ames, Cas. Eq., 11, n. 2.

63 See note 65, *post.*

64 See Walsh, Prop. (2nd Ed.), 295. Compare Chafee, Modernizing Interpleader (1921), 30 Yale L. Jour. 814 at 831.

65 Hall v. Craig, 125 Ind. 523, 25 N. E. 538 (1890), [based on Ind. Rev. St. § 274]; Vernam v. Smith, 15 N. Y. 327 (1857), [*dictum*]. See notes 72, 73, 74, *post.* See reference to Professor Chafee's article *supra* note 64. A tenant who has paid his rent, is subsequently ousted by the adverse claimant and is forced to pay him mesne profits, should have been permitted to interplead. Ouster by the stranger is no defense to the action for rent accruing before the ouster. The landlord may refuse to take the tenant's place in the ejectment suit, and the tenant can only counterclaim for mesne profits *after he has paid them* as against the landlord's claim for rent.

In deciding whether the opposing claimants are demanding the same thing, the earlier cases have generally taken the narrow position that each must literally seek the same thing, so that the plaintiff will be denied interpleader if one of the claimants demands the contract price of the goods while the other demands their reasonable value.[66] However, in some of the states taking this position interpleader has been allowed a plaintiff taxed on his personal property in two different counties, each claiming him as a resident, the tax being for different amounts. The injustice of subjecting the plaintiff to two suits and possible double liability in these cases was so clear that the technical difficulty of difference in the claims, each claiming essentially the same thing, was not allowed to block the equitable remedy.[67] In other states the technical rule is insisted on,[68] though if the larger amount is deposited by the plaintiff it is clear that the only controversy is between the two counties, the rule applying that if the plaintiff admits liability for the larger sum, only part of which is claimed by one of the parties, he may interplead them, receiving back the balance if the smaller claim should be sustained.[69] The fundamental basis of the plaintiff's equity is not only to relieve him from the danger of double liability but also from the annoyance and expense of being forced to litigate two or more suits when he admits liability as to either one of the opposing claimants, the controversy being theirs, not his. In the cases above discussed, a technical difference between rent and mesne profits, between the contract price and

66 Slaney v. Sidney, 14 M. & W. 800, 153 Eng. Rep. 699 (1845), in which the vendor of tea claimed the price, and the other claimant demanded the reasonable value. See cases cited, 2 Ames, Cas. Eq., 12, n. 3, including Fulton Bank v. Chase, 6 N. Y. Supp. 126 (1889); Taylor v. Satterthwaite, 51 N. Y. St. Rep. 565 and Baxter v. Day, 73 Wis. 27, 40 N. W. 675 (1888) *accord*. That this technicality is no longer regarded as a bar to interpleader see Professor Chafee's article, *supra* note 64.

67 Thompson v. Ebbets, Hopkins Ch. Rep. 272 (N. Y. 1824); Dorn v. Fox, 61 N. Y. 264 (1874). The larger amount must be deposited, the balance being returnable if the other counties' claim should be sustained. Mohawk & Hudson R. Co. v. Clute, 4 Paige 384 (N. Y. 1834).

68 Macy v. Nantucket, 121 Mass. 351 (1876); Welch v. Boston, 208 Mass. 326, 94 N. E. 271 (1911); Greene v. Mumford, 4 R. I. 313 (1856).

69 See *supra* note 61, latter part. The equities are the same though the debt is not technically the same as in the cases cited in note 61.

reasonable value, and other cases in which differences arise in the claims for various reasons, but each depending on the same fundamental difference between the claimants, presents no real objection to interpleader if the plaintiff deposits the larger amount, admitting full liability to either party who may succeed in his claim.

Another technicality which, however, has not even the excuse of mere logic which supports the line of cases denying relief above referred to, arises from the supposed rule that there must be "privity" between the claimants, their title being derived from a common source, so that where the title of each is wholly distinct and independent of the other, interpleader cannot be had. The cases already considered of a tenant attempting to interplead his landlord and the holder of an adverse title fall within this group also. The same situation exists where a purchaser seeks to interplead his vendor and an adverse claimant of title to the land,[70] and where an agent or trustee brings interpleader against his principal or *cestui* and an adverse claimant[71] and in cases of interpleader by a bailee against an adverse claimant and his bailor,[72] though in each case equitable relief is just

[70] Blue v. Watson, 59 Miss. 619 (1882); Trigg v. Hitz, 17 Abb. Pr. 436 (N. Y. 1864); Baxter v. Day, 73 Wis. 27 (1888).

[71] Moore Printing etc. Co. v. Nat. etc. Co., 31 App. D. C. 452 (1908) aff'd 218 U. S. 422, 31 Sup. Ct. 64 (1910); Fairbanks v. Belknap, 135 Mass. 179 (1883); Atl. City Nat. B. v. Thompson, 82 N. J. Eq. 111, 87 Atl. 636 (1913); Marvin v. Elwood, 11 Paige 365 (N. Y. 1844).

Invective has taken the place of argument in some of the English cases. Thus in Dungey v. Angove, 2 Ves. Jr. 303, 30 Eng. Rep. 644 (1794), in which this doctrine seems to have originated as a *dictum* (See Clark, Equity, 570) where a tenant sought to interplead his landlord and an adverse claimant, the court referred to it as "a monstrous thing" . . . "as pernicious a practice, and as dangerous to the landed property of the kingdom as ever came before the court." And in Pearson v. Cardon, 2 Russ. & M. 606, 609, 39 Eng. Rep. 525, the court said: "That an agent should have the power of filing a bill of interpleader when his principal demands the redelivery of goods bailed with him, appeared to me so monstrous a proposition and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine." The statute establishing this "monstrous" doctrine in England is a sufficient commentary on this sample of judicial reasoning.

[72] Crawshay v. Thornton, 2 Mly. & Cr. 1, 40 Eng. Rep. 541 (1837), [though both defendants were suing in trover for the bailed goods, ad-

as clearly demanded as in the usual cases where interpleader is freely granted. In each case the plaintiff stands ready to pay or to deliver to the successful claimant whatever he may be entitled to, and the larger claim, if there should be some difference in the amount because of the difference in title, must be deposited by the plaintiff so that he may have no interest in the controversy, as explained above. The real controversy is between the defendants, and it is entirely unfair that the plaintiff should be subjected to the annoyance and expense of this litigation which is not really his, and the danger of possible double liability. The rule has been changed by statute in England,[73] and the later cases in the United States tend strongly to sustain the position that interpleader will lie as against adverse claimants of essentially the same thing where the plaintiff makes no claim to any interest in the result of the litigation, and is therefore in fact a stakeholder so far as the controversy between the defendants is concerned.[74]

mitting plaintiff's right to his charges as bailee, relief denied because plaintiff might be held independently liable to one of them by estoppel, irrespective of result of action between defendants]; First Nat. B. v. Beninger, 26 N. J. Eq. 345 (1875), [adverse claimant to bonds deposited as indemnity for bail. The court said: "If this were a case of first impression, no difficulty would be found in declaring it fell clearly within the purposes designed to be accomplished in the establishment of a court of equity. But the rule . . . is too firmly established to be changed by anything short of legislative power"]; Third Nat. B. v. Skillings Lumber Co., 132 Mass. 410 (1882).

73 Common Law Procedure Act, 1860, §§ 12, 23 and 24 Vict. c. 126 § 12. In Attenborough v. St. Katherine's Co., 3 C. P. Div. 450, the court said (p. 455), that the purpose of the statute above cited was to do away with the effect of the decision in Crawshay v. Thornton, *supra* note 72. See 2 Ames, Cas. Eq., 24, n.

74 McGinn v. Interstate Nat. B., 178 Mo. App. 347, 166 S. W. 345 (1914); Boyle v. Manion, 74 Miss. 572, 21 So. 530 [interpleader as to claim for proceeds of timber cut by plaintiff as against an adverse claimant of the land]; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991 (1890), [not definitely deciding question, but leaning against old rule]; Follett Wool Co. v. Albany Term. etc. Co., 61 App. Div. 296, 70 N. Y. Supp. 474 (1901); Beebe v. Mead, 101 App. Div. 30, 92 N. Y. Supp. 51 (1905), [interpleader without privity]. The injustice of the supposed rule denying interpleader in these cases is admitted in the more important cases sustaining the rule on the basis of prior decision, as in First Nat. B. v. Beninger, *supra* note 72, and Bartlett v. The Sultan, 23 Fed. 257 (1885), by Wallace, J., at 258.

In these cases it is not necessarily a defense to interpleader that a judgment in one of the cases brought against the defendant will be a bar to an action by the other claimant. A disinterested party should not be compelled to bear the burden of the litigation involving a dispute between others.[75]

The argument that the plaintiff is technically a tort feasor as to one of the defendants, sometimes advanced as an objection to interpleader in his favor,[76] is without substance, as the same argument applies in most cases where the right to interpleader is not doubted. It is on this ground that some cases deny interpleader to a sheriff who has levied on goods where an adverse claim is made by a third person.[77] The obvious justice of allowing him to interplead in spite of purely technical objections based on his lack of status as a stakeholder has resulted in allowing him to interplead, by statute and decision in England and some states or by decision alone in many others.[78]

It is clear from what has been said that interpleader will not lie where the plaintiff is or may be liable to both defendants. He is in no sense a stakeholder in such cases, and the equity involved in interpleader has no application.[79]

In Platte Valley State B. v. Nat. Live Stock B., 155 Ill. 250, 40 N. E. 621 (1895), though no privity existed between the defendants, one claiming the deposit as the proceeds of a tortious sale of its cattle, and the other claiming through the tortious wrongdoer, interpleader was allowed because of the obvious justice of such action, ignoring the lack of privity. The power and duty of the courts to correct obvious error of this kind without the aid of legislation has been so often pointed out heretofore in this work that further discussion would seem to be unnecessary. See *post* note 85. Professor Chafee in the article referred to *supra* note 64 (pp. 828–840) makes clear how this error became established, and the complete lack of any reasonable basis for it.

75 Roberts v. Bell, 7 El. & Bl. 323, 11 Eng. Rep. 1267 (1857), the court saying that where the purpose is simply to substitute the depositor for the depositee it should be done. "By doing so the depositee is relieved, and no burden is cast upon the depositor beyond what he must bear if the chattel is given up to him, and the claimant sues him. If no more is asked than that the action should be defended by you, it should be done." Quoted, 2 Ames, Cas. Eq., 27, n.

76 First Nat. B. v. Beninger, *supra* note 72. See Clark, Equity, 574.

77 Parker v. Barker, 42 N. H. 78 (1860); McDonald v. Allen, 37 Wis. 108 (1875).

78 See 2 Ames, Cas. Eq., 34, 35, 36, notes.

79 Nat. Life Ins. Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93 (1886). For a number of cases involving application of interpleader to conflicting insurance claims see § 13,

Statutes and later decisions in England and many of the states have for the most part put interpleader on a sane basis freed of most of the technicality which has disfigured the development of this form of equitable relief. In England the only limitations are (a) that "the applicant claims no interest in the subject-matter in dispute, other than for charges or costs, (b) that the applicant does not collude with any the claimants; (c) that the applicant is willing to pay or transfer the subject-matter into court or dispose of it as the court or a judge may direct." Even though after the settlement of the principal controversy between the defendants there may still remain a possible liability of the plaintiff to one of the defendants which is distinct from the matter litigated between them, interpleader of the matter which is in dispute may be had, *contra* to the position in Crawshay v. Thornton.[80] In New York and many of the states most of the interpleader cases are provided for by a statute allowing a summary motion to substitute the adverse claimant in the place of the stakeholder in any "action to recover upon a contract, or an action of ejectment, or an action to recover a chattel," on proof by affidavit before answer that a person not a party to the action makes a demand against him for the same debt or property, without collusion, and to discharge him from liability to either on paying into court the amount of the debt, or delivering the property or its value as the court directs.[81]

ante, and cases therein cited and discussed. For miscellaneous cases of possible liability of the plaintiff to both claimants see 2 Ames, Cas. Eq., 38, n. A very good illustration of the distinction between claims which will be interpleaded because they involve the same claim or thing and independent claims which will not be interpleaded are the conflicting claims of brokers to a single commission offered to the broker who procures a sale, in which interpleader may be had [Trembley v. Marshall, 118 App. Div. 839, 103 N. Y. Supp. 680 (1907); Myers v. Batcheller, 177 App. Div. 47, 163 N. Y. Supp. 688 (1917); Preston v Rice, 185 App. Div. 682, 173 N. Y. Supp. 691 (1919)] and cases of brokers with whom the plaintiff has made separate contracts so that he may be liable to both in which cases interpleader is not allowed. Alton v. Merritt, 145 Minn. 426, 177 N. W. 770 (1920); Chafee, 30 Yale L. J. 819.

80 Note 73, *ante*. To this effect see In re Morsey Docks and Harbor Board, L. R. (1899) 1 Q. B. Div. 546.

81 See decisions from Ala., Cal., Ind., Iowa, Ky., Mass., Minn., Miss., Nebr., N. Y., N. C., Oh., Okl., S. C. applying such statutes, 33 C. J. 421, n. 37. Statutes in the different

Where interpleader would not lie the motion will not be granted, as in a case where the opposing claim is so obviously invalid that the defendant moving to interplead incurs no hazard.[82] The motion may be used only in actions specifically provided for in the statute,[83] but on the other hand the action of interpleader may be had exactly as before, whether or not the case falls under the statute providing for substitution of defendant by motion.[84]

The general recognition by the modern cases that technical differences in form or amount in the contending claims is no bar to interpleader if essentially the same thing is claimed by both parties and the elimination of the mistaken notion of "privity" in many states by statute or decision, and the strong probability that this "privity" will be eliminated elsewhere, leave the law in the United States very close to the result accomplished by the English statute.[85]

states on interpleader are assembled in Maclennan, Interpleader, Appendix (1901).

82 N. Y. Code, § 820, Civ. Pr. Act, § 287; Stevenson v. N. Y. Life Ins. Co., 10 App. Div. 233, 41 N. Y. Supp. 964 (1896); Pouch v. Prudential Ins. Co., 204 N. Y. 281, 97 N. E. 731 (1912). That "privity" is not required in New York irrespective of statute see N. Y. cases *supra* note 74. "It is a short method for accomplishing the purposes of a bill of interpleader in equity, and applies only when the facts would authorize a resort to a bill of interpleader in equity." H. C. Shrader Co. v. A. Z. Bailey Co., 15 Ala. App. 647, 74 So. 749 (1917).

83 The statute has been strictly construed in New York. Thus the motion was not allowed in an action of conversion, since not an action in contract or ejectment or to recover a chattel. La Femina v. Arsene, 69 App. Div. 285, 74 N. Y. Supp. 749 (1902); not allowed in action for money had and received. Am. Trust etc. Bank v. Thalheimer, 29 App. Div. 170, 51 N. Y. Supp. 813 (898).

84 See cases cited 33 C. J. 422, notes 46–52.

85 Chafee, Modernizing Interpleader, *post* note 86, at pp. 839, 840. Professor Chafee cites Cal. Code, § 386, as abolishing privity as a requirement, followed by the codes in Idaho, Montana and Utah. He cites Conn. Gen. St. 1918, § 6055 as accomplishing the same result. In Massachusetts a bank was allowed to interplead the owner of a note and its indorser who sought to recover the money he had paid on the note on the ground of mistake, though no "privity" existed. Roberts v. U. S. Trust Co., 234 Mass. 224, 125 N. E. 185 (1919). He points out that in many states interpleader has been allowed to sheriffs, warehousemen under the Uniform Warehouse Receipts Act, § 17, effective in 39 states, bailees under the Uniform Bill of

Actions, so called, in the nature of interpleader are actions in equity in which a final settlement of the controversy demands that additional persons be brought in so that their conflicting claims may be determined. This is entirely a matter of practice in equity and has no real connection with the principle of interpleader. They are in no sense bills of interpleader, and the usual requirements of interpleader, that the plaintiff be a stakeholder without personal interest in the outcome, that there be an affidavit of no collusion, and that the money or *res* be deposited in court, have no application to such cases.[86]

Lading Act, § 20, adopted in 20 states, as well as to savings banks in Massachusetts and trust companies in New York. Mass. Acts 1908, Ch. 590, § 50; N. Y. Banking Law, § 199. He says "It is to be hoped that judges in the many states which have adopted these two statutes will come to regard them as enunciations of a broad commercial principle that bailees should have relief regardless of privity, and will extend this statutory principle, by analogy, to bailees and other persons not within the Acts, just as they would extend a principle laid down by a judge in a decision to other situations not before that judge," citing Roscoe Pound, Common Law and Legislation (1908), 21 Harv. L. Rev. 383; Donald E. Dunbar, Statutory Principles in the Common Law (1917), 30 Harv. L. Rev. 742; Chafee, Cases on Negotiable Instruments, 33 n. See argument for a like extension of the general principle that courts of equity may act *in rem* from statutes so providing in the more important situations in England and all the states except three, pages 61, 62, *ante*. See also *supra* note 74.

[86] Aleck v. Jackson, 49 N. J. Eq. 507, 23 Atl. 760 (1892), and cases cited, 2 Ames, Cas. Eq., 46, n.

For a more detailed treatment of modern development in interpleader see Chafee, Modernizing Interpleader (1921), 30 Yale L. J. 814. As to jurisdictional difficulties where one or more of the claimants are nonresidents and can be served only by publication, see § 13, *ante;* also Chafee, Interstate Interpleader (1924), 33 Yale L. J. 685.

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